Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-863

A. LASAPONARA & SONS, INC., A WHOLLY OWNED SUBSIDIARY OF ERE INDUSTRIES, INC., AND ERE INDUSTRIES, INC.

Petitioners

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

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v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on October 14, 1976.

OPINION BELOW

The opinion of the Court of Appeals appears at —— F.2d ——, 93 LRRM 2314 (C.A. 2, 1976). The opinion of the National Labor Relations Board appears at 218 NLRB No. 168, 89 LRRM 1858 (1975). Copies of these opinions are in the Appendix, attached hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on October 14, 1976. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a one day strike by employees aimed at inflicting serious economic harm on the Company and at avoiding regularly scheduled work is protected under the National Labor Relations Act, 29 U.S.C. §§ 151, et seq., where the countervailing interest of the employees involved is insubstantial.

2. Whether a successor employer is required by the National Labor Relations Act, 29 U.S.C. §§ 151 et seq., and by this Court's decision in *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972), to recognize and bargain collectively with the incumbent union where (a) the Union was voluntarily recognized by the predecessor employer without the knowledge of the successor employer, (b) recognition of the Union by the predecessor employer was contingent on the sale or merger of the Company, (c) the Union neither attained majority status through a Board election nor was certified as exclusive representative by the Board under Section 9(c) of the National Labor Relations Act, 29 U.S.C. § 159(c), and (d) the Union never entered into a collective bargaining agreement with the predecessor employer.

STATUTORY PROVISIONS INVOLVED

"United States Code, Title 29:

SEC. 157. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 158. (a) It shall be an unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

SEC. 159(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

STATEMENT OF THE CASE

A. Lasaponara & Sons, Inc. ("Company") is engaged in the production of Ricotta and other Italian cheeses and cheese products which it distributes in greater metropolitan New York to pastry shops, Italian shops and grocery stores. The Company's plant is located in Oriskany, New York.

On December 3, 1973, Company President, Joseph Lasaponara, received a letter from an official of the Mechanics Educational Society of America, AFL-CIO ("Union") claiming that the Union represented the Company's production and maintenance employees and requesting that the parties negotiate a collective bargaining agreement. A majority of these employees had signed cards authorizing the Union as their exclusive representative for the purpose of collective bargaining. Two days later, the Union filed a representation petition with the Board.

Subsequently, at meetings held on December 10 and 12, representatives of the Company, including Lasaponara, informed Union officials that Lasaponara had no objection to the Union but that the Company was

involved in merger discussions with another corporation which could be interrupted or even jeopardized if a Union election was held. The Union responded that an election could be avoided if the Company would grant voluntary recognition and made other proposals, but nothing was finalized.

On December 14, Lasaponara met with Union officials to discuss a recognition date. The Union proposed April 1, 1974, and told Lasaponara that they would prepare a formal Recognition Agreement to take effect on that date, contingent upon the sale or merger of the Company, and would withdraw their petition for a Board election. In addition, the parties agreed to a 20¢ per hour wage increase.

On December 20, Union officials presented Company Production Manager, Fazzino, with the Recognition Agreement for transmittal to Lasaponara. On the same day, the Union requested that the NLRB withdraw its election petition. This request was granted on December 26.

Although the Company increased wages by 20¢ per hour on December 24, Lasaponara never signed the Recognition Agreement. The Union made only two inquiries concerning the unexecuted agreement; once in January and again in February.

Meanwhile, Lasaponara was negotiating the sale of the Company to ERE Industries, Inc. A purchase agreement was reached which provided for the sale of all outstanding stock to ERE on March 7, 1974. The final closing occurred on April 23, 1974, at which time Frank Oddi became President of the Company and Joseph Lasaponara became sales manager. Neither Mr. Oddi nor anyone else from ERE Industries was aware

of any recognition agreement made by Lasaponara with the Union.

The Union was informed of the sale of the Company on March 25. On March 27, Oddi addressed the Company's employees. He informed them that he would shortly be the new president of the Company and that employment benefits provided ERE employees would be put into effect once the merger was completed on April 23. (These benefits were put into effect on May 1.) None of the employees raised the question of a union at this meeting.

On June 7, 1974, one month after he became the Company's president, Oddi instructed Plant Manager, Fazzino, to discharge six employees for their refusal to work on Palm Sunday, a regularly scheduled work day at the plant for the past 25 years. The Lasaponara plant had customarily been operated on Palm Sunday because that holiday occurs during the Easter season which is the busiest time of the year in the Ricotta cheese industry. Seven-day-a-week production is necessary during the Easter season since Ricotta cheese is highly perishable and cannot be made in advance or held for storage.

The Company was taken by surprise when on April 5, the Friday before Palm Sunday, a Union representative presented Fazzino with a typewritten petition, signed by 12 of the Company's 20 employees, demanding that Palm Sunday not be scheduled as a work day and advising that if this was not done the undersigned employees would not report for work that day. He then assembled the employees and explained that he needed them in order to get production out at this very critical period. Six of the twelve employees who had signed the

petition responded to his plea for help and reported to work on Sunday with the rest of the work force. The other six employees did not report for work.

Fazzino then advised Oddi of the employees' demand and of the six absences. Oddi told him that, since he was not yet in control of the Company, he couldn't tell Fazzino what to do, but suggested caution. After the sale was finally consummated on April 24, 1974, Oddi commenced an investigation and consulted with legal counsel on this matter. This investigation and advice of counsel resulted in the June 7 decision to discharge the six absent employees.

The General Counsel filed a complaint alleging that the Company violated Sections 8(a)(1), (3) and (5) of the National Labor Relations Act and a hearing was held before an Administrative Law Judge. On November 22, 1974, the Administrative Law Judge issued his decision. He concluded:

1. Lasaponara and ERE violated Section 8(a)(1) and (5) by making unilateral changes in the terms and conditions of employment and by otherwise ignoring the Union after Lasaponara had "agreed" in December 1973, to prospectively recognize the Union as of April 1, 1974, contingent upon the sale or merger of the Company.

2. Lasaponara and ERE violated Section 8(a)(1) and (3) by discharging the six employees who refused to work on Palm Sunday, April 7, 1974.

3. Lasaponara and ERE violated Section 8(a)(1) by interrogation of employees regarding Union activities.[1]

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[1] The factual details of this finding are not material to the questions presented in this petition.

4. Lasaponara and ERE violated Section 8(a)(3) by refusing to rehire Peter Muraca because of that employee's Union activities.[2]

Based on these findings, the Judge ordered the Company to offer reinstatement, with backpay to the discharged employees; to offer employment, with back pay to Muraca; to cease and desist from interfering with the employees in the exercise of their Section 7 rights; to rescind the unilateral changes made in the terms and conditions of employment and; upon request, to bargain collectively with the Union as the exclusive bargaining representative of its employees.

With minor exception, the Board, on June 30, 1975, adopted without discussion the rulings, findings and conclusions of the Administrative Law Judge. 218 NLRB No. 168 (1975).

By decision issued September 13, 1976, the United States Court of Appeals for the Second Circuit granted enforcement of the Board's order. —— F.2d ——, 93 LRRM 2314 (C.A. 2, 1976).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With Decisions of Other Courts of Appeals as to the Proper Interpretation of "Protected Activity" under the National Labor Relations Act, 29 U.S.C. § 151, et seq.

The heart of the National Labor Relations Act is Section 7, 29 U.S.C. § 157, which provides in pertinent part:

> "Employees shall have the right to self-organization . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

[2] Id.

Despite the broad language of Section 7, the Board and the Courts found that not all concerted activity is protected and have excluded certain concerted activities from the protection of the Act.[3] Surprisingly, after all these years, the law is in a state of conflict amounting to confusion as to what types of concerted activities are protected and what are not.

Although the Palm Sunday strike engaged in by six of the Company's employees may not fit precisely into any of the unprotected areas listed in footnote 3 below, the principles governing these decisions clearly apply in the instant case. Petitioners believe that the

[3] See, *NLRB* v. *Rockaway News Supply Co.*, 345 U.S. 71 (1952) (discharge, for violation of an obligation to make deliveries, even though crossing a picket line, sustained); *International Union, U.A.W., A.F. of L., Local 232* v. *Wisconsin Employment Relations Board*, 336 U.S. 245, 255-263, (1948) (arbitrary unannounced interruptions of work, not protected by § 7); *Southern S.S. Co.* v. *NLRB*, 316 U.S. 31 (1941) (discharge of seamen, for disobedience on shipboard while away from home port, sustained); *Allen-Bradley Local 1111, United Electrical Radio and Machine Workers of America* v. *Wisconsin Employment Relations Board*, 315 U.S. 740 (1941) (mass picketing, unprotected); *Hotel and Restaurant Employees' International Alliance, Local No. 122* v. *Wisconsin Employment Relations Board*, 315 U.S. 437 (1941) (violence, while picketing, unprotected); *NLRB* v. *Sands Manufacturing Co.*, 306 U.S. 332 (1938) (discharge, for repudiation of employee's agreement, sustained); *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1938) (discharge, for tortious conduct, violence or sit-down, sustained); *NLRB* v. *Local Union No. 1229, International Brotherhood of Electrical Workers*, 346 U.S. 464 (1953) (discharge, for disparaging attacks on quality of Company's product and its business policies, sustained); *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50 (1975) (discharge of two employees picketing to protest alleged racial discrimination by the employer where employees did not operate through the union, sustained).

walkout here was unprotected since it was called for the obvious purpose of disrupting the Company's work schedule at a time these employees knew they could inflict the most severe economic loss on the Company without obtaining any substantial countervailing benefit to themselves.

Nevertheless, the Second Circuit held that the walkout was protected under Section 7. Such a holding is in conflict with decisions by the other Courts of Appeals and the decisions of this Court which are listed in footnote 3. This conflict requires that the Court grant certiorari to review the judgment below.

In determining that the strike was protected under Section 7, the Second Circuit held that the rule of thumb is whether the economic pressure brought to bear upon the Company was grossly disproportionate to the goal the employees sought to achieve. The Second Circuit found that the Palm Sunday strike served a "legitimate work-related goal" and was therefore protected by the Act. *NLRB* v. *Lasaponara & Sons,* 93 LRRM at 2319. The Court further found that the economic hardship inflicted was not disproportionate to that goal.

These findings are intriguing in that there was no "work-related goal" argued, presented or identified by the employees or by the Court. The only reason the employees gave for their absence was that Palm Sunday was "a religious holiday." But the employees did not state that their religion was a factor and neither the Board nor the Court so found. The employees at Lasaponara had worked on Palm Sunday for the past 25 years and, because Palm Sunday production was absolutely essential to the very existence of the Italian

cheese business of the Company, the refusal of the 12 employees to work on Palm Sunday would have dealt a death blow to the business.

It is thus apparent that the economic hardship to the employer was certainly disproportionate to any undefined benefit to the employees. The Board's reasoning was not that of the Court. The Board never attempted to balance the hardship to the Company against any benefit to the employees. The Administrative Law Judge held, with the Board's rubber stamp of approval, that the activity was permitted because it was a one-time strike with no evidence of intent to engage in repeated or intermittent strikes. This is dubious reasoning at best, and at odds with the theory relied on by the Court below in affirming the opinion of the Judge and the Board.

All of this serves to further confuse the state of the law.

To support its position, the Second Circuit relied on decisions by the First Circuit in *NLRB* v. *Leprino Cheese Co.,* 424 F.2d 184 (C.A. 10, 1970), cert. denied, 400 U.S. 915 (1970); the Third Circuit in *NLRB* v. *Morris Fishman and Sons, Inc.,* 278 F.2d 792 (C.A. 3, 1960); and the Tenth Circuit in *NLRB* v. *M&M Bakeries, Inc.,* 271 F.2d 602 (C.A. 1, 1959). As in the instant case, *Leprino Cheese, Morris Fishman* and *M&M Bakeries,* each involved one day strikes called on short notice, which were aimed at jeopardizing the Company's production of perishable goods and at its vulnerability during a high demand holiday season.[4] A

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[4] It is important to note that in *Leprino Cheese, supra,* (strike to compel double-time pay on holidays); *Morris Fishman, supra* (strike to compel recognition); and *M&M Bakeries, supra* (strike to compel contract negotiations), the employees involved had a

common element in each of these decisions was the finding that although the strike threatened to inflict economic hardship on the employer and was called on short notice, it was still protected under Section 7 because the Company was not threatened with aggravated *physical* injury or exposed to severe economic harm. *A. Lasaponara & Sons, supra* at 2319; *Leprino Cheese, supra* at 187; *Morris Fishman, supra* at 796; *M&M Bakeries, supra* at 605.

Other Circuit Courts, however, have found that concerted activity intended to inflict *serious economic* hardship on an employer and concerted activity which is of such a nature that it interferes with efficient production should also be unprotected.

Thus, in *NLRB* v. *Marshall Car Wheel and Foundry Co.*, 218 F.2d 409, 413 (C.A. 5, 1955), the Court ruled that the Company lawfully discharged those employees who had engaged in a walkout which was ". . . deliberately timed with . . . the purpose of causing maximum plant damage and financial loss . . ." to the employer. Moreover, in that case the strike was an economic strike and as such served a "work-related" interest of the strikers. Accord; *NLRB* v. *Reynolds & Manley Lumber Co.*, 212 F.2d 155 (C.A. 5, 1954); *U.S. Steel Company* v. *NLRB*, 196 F.2d 459 (C.A. 7, 1952). Subsequently, in *Dobbs Houses, Inc.* v. *NLRB*, 325 F.2d 531, 539 (C.A. 5, 1963), the Fifth Circuit found that a sudden walkout by waitresses during the dinner hour was an unprotected method of protesting the discharge of a favored supervisor since the concerted means were not reasonably justified by the ends to be achieved.

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long-term objective. In the instant case, the employees objective was completely satisfied by their walkout and there was nothing left to negotiate with the Company.

The Fifth Circuit's opinion in *Dobbs Houses* was closely followed by the Seventh Circuit in *American Art Clay Co.* v. *NLRB*, 328 F.2d 88 (C.A. 7, 1964); another case involving a strike to protest a change in supervisory personnel. In *American Art*, the Seventh Circuit held that:

> ". . . there is a distinction between moderate conduct as protected activity, on the one hand, and intemperate activities during working hours which destroy the efficient operation of an employer's business, on the other hand." 328 F.2d at 90-91.

The Ninth Circuit similarly found in *Shelly & Anderson Furniture Co.* v. *NLRB*, 497 F.2d 1200, 1203 (C.A. 9, 1974) that a "partial or intermittent" work stoppage is not protected by Section 7 of the Act.

The above cited decisions indicate that there is wide disparity among the Circuits regarding the scope of protected activity under the National Labor Relations Act. These conflicts justify the grant of certiorari to review the important questions raised by the judgment below.

2. The Decision Below Raises Important Questions Left Unresolved by the Court's Opinion in *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972) Concerning the Obligation of a Successor Employer to Recognize and Bargain with An Incumbent Union

The court below found that because ERE Industries, Inc., was the successor to A. Lasaponara & Sons, Inc., it was, therefore, bound by this Court's decision in *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 279 (1972), to recognize and bargain with the incumbent Union. *NLRB* v. *Lasaponara & Sons*, 93 LRRM at 2316. By so ruling, the Court of Appeals

overlooked the following significant factual distinctions between *Burns, supra,* and the instant case:

BURNS	*THE INSTANT CASE*
1. The incumbent union was victorious in a recent Board representation election and was *certified* by the Board (*Burns, supra,* at 278).	1. The incumbent union was prospectively recognized by the predecessor employer on a voluntary basis contingent on the sale or merger of the Company and was *not certified* by the Board (*A. Lasaponara & Sons, supra,* at 2316-2317).
2. The successor employer had *knowledge* of current recognition of the Union at the time it took over the business (*Burns, supra* at 278-279).	2. The successor employer had *no knowledge* of the secret and prospective recognition by the predecessor prior to taking over operation of the Company. (This fact was raised by the Company in its brief below, but was not addressed by the Court of Appeals).
3. The incumbent union had entered into a *collective bargaining agreement* with the predecessor employer and the successor employer was aware of that agreement (*Burns, supra,* at 278).	3. There was *no collective bargaining agreement* between the incumbent union and the predecessor employer (*A. Lasaponara & Sons, supra,* at 2316).

Petitioners maintain that the above stated differences readily demonstrate that the Second Circuit was wrong in ruling that *Burns, supra,* was controlling in the instant case. To the contrary, Petitioners contend that the instant case raises important and compelling questions left unresolved in *Burns,* regarding the extent to which a successor employer has a legal obligation to recognize an incumbent union, which are now ripe for review by this Court.

Since *Burns, supra,* some Circuits have had the opportunity to rule on the obligation of a successor employer to recognize an uncertified incumbent union. In *NLRB* v. *Tragview, Inc.,* 470 F.2d 669 (C.A. 9, 1972), the Ninth Circuit held that the successor employer did not violate the National Labor Relations Act by refusing to recognizing the incumbent union, which it alleged did not represent a majority of the employees, where the union had been voluntarily recognized by the predecessor employer and the expiration of the last collective bargaining agreement coincided with the sale of the business. The Seventh Circuit apparently disagreed. It found that where there is at least a prima facie showing that the incumbent union represented a majority of the employees within the year prior to the change in ownership, it must be presumed that the union's majority status continued beyond the changeover.[5] *NLRB* v. *Bachrodt Chevrolet Co.,* 468 F.2d 963 (C.A. 7, 1972).[6] But for reasons stated, that decision is not apposite here.

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[5] The one-year period adopted by the Seventh Circuit apparently was based on this Court's earlier holding that once a union is certified there is an irrebuttable presumption that the union retains its majority status for one year. *Brooks* v. *NLRB,* 348 U.S. 96 (1954).

[6] The Court granted certiorari in this case for the purpose of ordering the Court of Appeals to remand to the Board with in-

A union is certified under Section 9(c) of the National Labor Relations Act, 29 U.S.C. § 159(c), as exclusive bargaining representative only if it wins a Board-conducted election. This Court most recently affirmed its preference for the electoral process in *Linden Lumber Division, Summer & Co.* v. *NLRB*, 419 U.S. 301 (1974) where it found that an employer has the absolute right to refuse recognition based on authorization cards only and that a union faced with such a refusal has the burden of taking the next step of invoking the Board's election procedures. The Union in the instant case gained recognized status on the basis of authorization cards shown to the predecessor employer. Neither Lasaponara nor the Union ever communicated the existence of the Union to ERE Industries prior to the merger. Most importantly, Lasaponara did not currently recognize the Union but at most gave it prospective recognition in secret. It was as if the predecessor was making a deal to avoid the Union during the predecessor's tenure by agreeing to foist the Union on the unknowing successor.' Nor was there a written recognition or collective bargaining agreement in the Company's records which might have put ERE Industries on notice as to the existence of the Union. Petitioners thus believe, contrary to the opinion of the Second Circuit, that ERE Industries, although a successor employer, was not required by this Court's decision in

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structions to reconsider in accordance with *Burns, supra*, 423 U.S. 927 (1973).

' See *NLRB* v. *Spooner* and *D.&F. Super Market*, 76 LC ¶ 10699 (C.A. 10, 1975), where the court found that under *Burns* a successor employer who learned that the incumbent union had been voluntarily recognized only after taking over the operation of the business had a duty to bargain with the Union.

Burns, supra, to recognize the noncertified Union of which it had no knowledge when it purchased the Company.

In view of the significance of this issue and its impact on the collective bargaining obligation of a successor employer, it is essential that the Court grant review.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

U.S. COURT OF APPEALS, SECOND CIRCUIT (NEW YORK)

NLRB v. LASAPONARA & SONS, INC.

NATIONAL LABOR RELATIONS BOARD v. A. LASAPONARA & SONS, INC., a wholly owned subsidiary of ERE INDUSTRIES, INC. and ERE INDUSTRIES, INC., No. 75-4215.

(FILED SEPTEMBER 13, 1976)

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Before HAYS, MULLIGAN, and MESKILL, Circuit Judges.

Full Text of Opinion

HAYS, Circuit Judge:—Petitioner National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e) seeks enforcement of its order filed on June 30, 1975, adopting the findings and conclusions of the Administrative Law Judge that respondents have engaged in several unfair labor practices in violation of Sections 8(a)(1), (3) and (5) of the Act, 29 U.S.C. § 151 et seq.[1] We enforce the Board's order in all respects.

I. *Withdrawal of Recognition and Unilateral Changes in the Terms of Employment*

Respondent A. Lasaponara & Sons, Inc. (the "Company" or "employer") is engaged in the manufacture and wholesale distribution of cheese and related products at its plant in Oriskany, New York. During the autumn of 1973 a majority of the production and maintenance employees at the Oriskany plant signed authorization cards

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[1] The Board's decision is reported at 218 NLRB No. 168, 89 LRRM 1858 (1975).

designating the Mechanics Educational Society of America, AFL-CIO (the "Union"), as their sole representative for the purposes of collective bargaining.[2] On December 3, 1973 Joseph Lasaponara, president of the Company, received a letter from James Kozma, an official of the Union, requesting Lasaponara to meet with the Union representatives to negotiate a collective bargaining agreement. On December 5 the Union filed a petition for a representation election with the National Labor Relations Board and two days later informed the Company by letter that several of the Company's employees had been elected to the Union shop committee at the plant. Lasaponara contacted the president of the Oneida Development Corporation, Thomas Zappone, and requested him to meet with the Union to discuss the situation. Oneida Development Corporation had been instrumental in bringing the Company to Oriskany and it maintained certain authority with respect to any sale of ownership interests in the business. At his meeting with the Union representatives Kozma and James DeBella on December 10, Zapone explained his relationship to the Company and stated that the Company was currently engaged in merger discussions with another corporation which might be jeopardized by a representation election at that time. The Union officials replied that they had no wish to disrupt the negotiations and requested a meeting with Lasaponara so that a solution could be achieved.

On December 12, 1973 Kozma and DeBella met with Lasaponara and Zappone. The Board found that at the meeting Lasaponara stated that he had no objection to the Union but expressed concern that an election at that time could affect production and consequently upset merger negotiations. The Union officials informed Lasapanora that an

[2] The respondents do not dispute the Board's conclusion that these employees constitute an appropriate collective bargaining unit within the meaning of Section 9(b) of the Act, 29 U.S.C. § 159(b).

election would be unnecessary because the Employer could voluntarily recognize the Union as its employees' exclusive bargaining agent on the basis of the authorization cards which the Union had secured from a majority of the Oriskany plant workers. In addition to voluntary recognition the Union officials proposed an immediate 25¢ per hour wage increase and a delay in formalizing a contract. There also was a discussion of certain other contract terms and Lasaponara stated that he would consider the Union's proposal.

On December 14, 1973 Lasaponara again met with Kozma and DeBella. According to credited testimony at the Board hearing Lasaponara stated that he was not willing to sign a contract with the Union at that time but that he would grant a 20¢ per hour wage increase if the Union would take it into account when negotiations for a full contract took place. The Union representatives agreed to the 20¢ figure provided that the Employer continued certain past practices concerning employment benefits and regular wage increases. The Board found that at the December 14 meeting Lasaponara agreed to sign a formal Recognition Agreement and begin full contract discussions with the Union on April 1, 1974 by which time it was assumed the merger negotiations would be completed. In return the Union representatives agreed to withdraw the election petition from the Board. On December 20, 1973 Kozma and DeBella presented the Employer's Production Manager, Fazzino, with the written Recognition Agreement for transmittal to Lasaponara.[3] On the same day the Union sent a withdrawal

[3] This document provided in full:

"RECOGNITION AGREEMENT
by and between
LASAPONARA & SONS, INC.
and
MECHANICS EDUCATIONAL SOCIETY
OF AMERICA
AFL-CIO

Effective April 1, 197[4], Lasaponara & Sons, Inc. will recog-

request to the NLRB which was granted on December 26.[4]

Although the Company, as it had agreed, instituted the 20¢ per hour wage increase on December 24, 1973, Lasaponara failed to sign the formal Recognition Agreement. DeBella contacted Fazzino shortly after the 1st of January to inquire why the document had not been signed and returned. Fazzino told DeBella that the intervening holidays had delayed transmittal of the document to Lasaponara but that the Union would soon receive it. On February 5 DeBella spoke to Fazzino about certain employee complaints concerning health insurance coverage and wage increases and, on this occasion, again raised the matter of the unexecuted Recognition Agreement. Fazzino replied that Lasaponara had been very busy. The next day DeBella contacted Zappone in an attempt to arrange a meeting with Lasaponara. This effort was unsuccessful.

In early March, 1974 DeBella again contacted Fazzino to discuss the proposed layoff of certain employees, including several members of the Union committee. DeBella contended that such a layoff would be improper and that the Union would file charges if it took place. Fazzino discussed the matter with Lasaponara and the layoff was not effectuated. In addition, DeBella spoke directly with Lasaponara on March 5 about certain other employee complaints. Lasaponara suggested that DeBella put these grievances into writing and the latter did so in a letter dated March 8.

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nize the Mechanics Educational Society of America, AFL-CIO as the sole collective bargaining agency on behalf of the employees employed at its plant located on Base Road, Oriskany, N.Y. for rates of pay, wages, hours of work and any other conditions of employment."

[4] On January 14, 1974 the Union sought to withdraw a representation petition that it had filed with the New York State Labor Department. This request was granted on February 8, 1974.

In the meantime merger discussions were continuing between the Company and respondent ERE Industries, Inc. ("ERE") which was to purchase all the Company's stock. DeBella was made aware of this in March by Zappone who also gave DeBella the name and telephone number of Frank Oddi, the president of ERE. On March 27, 1974, Oddi addressed the Company's employees telling them in effect that he was to be the new president of A. Lasaponara & Sons, Inc., and that the employment benefits provided by the parent company, ERE, would be extended to them. On April 1 DeBella placed a telephone call to Oddi and, failing to reach him, left a message requesting that he call the Union. It was determined by the Board that Oddi was apprised of the call but never returned it. On April 23 ERE assumed ownership of the Company.[5] On May 1, the changes in the employment conditions of the Company promised by Oddi were put into effect.

On the basis of the foregoing findings the Board held that the Company violated Sections 8(a)(5) and (1) of the Act, 29 U.S.C. §§ 158(a)(5), (1),[6] by withdrawing recogni-

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[5] Joseph Lasaponara remained with the Company as its sales manager.

[6] 29 U.S.C. § 158 provides, in relevant part:

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

• • •

"(5) to refuse to bargain collectively with the representatives of his employees . . .

• • •

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either

tion from the Union and refusing to bargain collectively and by unilaterally changing the terms and conditions of employment of its employees. We agree. Once a collective bargaining agent is voluntarily recognized by an employer as the representative of its employees the bargaining relationship must be permitted to continue and recognition may not be withdrawn at will. See N.L.R.B. v. Broad Street Hospital and Medical Center, 452 F.2d 302, 78 LRRM 3075 (3d Cir. 1971); N.L.R.B. v. San Clemente Publishing Corp., 408 F.2d 367, 70 LRRM 2677 (9th Cir. 1969). Unilateral changes in the terms of employment made by an employer in disregard of the duly-recognized collective bargaining agent is a well established violation of the employer's statutory duty to bargain collectively. N.L.R.B. v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962), N.L.R.B. v. General Electric Co., 418 F.2d 736, 746, 72 LRRM 2530 (2d Cir. 1969), cert. denied, 397 U.S. 965, 73 LRRM 2600 (1970). The only issue here is whether the Board correctly determined that the Employer voluntarily recognized the Union as the representative of its employees at the December 14 meeting between Lasaponara and the Union officials, Kozma and DeBella.[7] We hold that this conclusion is fully sup-

party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . ."

[7] Contrary to respondents' contention, the Administrative Law Judge and, consequently, the Board did not reject the General Counsel's theory that the Union was orally recognized at the December 14 meeting. The opinion of the Administrative Law Judge states, with respect to the General Counsel's argument:

"Considering all of the foregoing, I find that the facts support the General Counsel's contentions and do not support the Respondent's contentions. Thus, the facts reveal that the Union was designated as the collective bargaining representative by a majority of the employees in the appropriate bargaining unit. The facts are clear that the employing entity, in December, 1973, had no question as to the union's majority status but in fact agreed that such status existed. Thus, the employer's action in agreeing to recognize the Union in the future, without other evidence as to majority

ported by substantial evidence on the record as a whole. See Universal Camera Corp. v. NLRB, 340 U.S. 474, 27 LRRM 2373 (1951).

Respondents argue that Lasaponara agreed on December 14 to recognize the Union only in the event that the business was not sold and that therefore the Union at that time agreed to defer its demand for recognition until the merger negotiations were finished. However, the sole evidence supporting this position is Lasaponara's own testimony which the Administrative Law Judge declined to credit. On the other hand, the Board's finding of oral recognition on December 14 is supported by testimony of the Union officials Kozma and DeBella and by subsequently occurring events including (1) the fact that although the Union officials had secured authorization cards from a majority of the employees they had agreed to the Employer's request to forego an election and withdrew their petition to the Board, (2) the institution of a 20¢ per hour wage increase by the Employer shortly after December 14, which had been requested by the Union officials at that meeting, and (3) supervisor Fazzino's grievance adjustments with Union representative DeBella acting on behalf of certain employees. The inferences that the board drew from these incidents are reasonable and must therefore stand. Universal Camera Corp. v. N.L.R.B., supra. Since the Employer's voluntary oral recognition of the Union as the collective bargaining agent of its employees on December 14 is binding, N.L.R.B. v. Broad Street Hospital, supra 452 F.2d at 305, the fact that Lasaponara never signed the formal Recognition Agreement is immaterial. Under these circumstances the Company's refusal to bargain with the Union after the transfer of ownership and its institution of unilateral changes in the terms of employment constituted a clear

status, clearly fixes the Union as the recognized exclusive collective bargaining agent of the employees involved. Contrary to Respondent's contentions, the facts do not reveal that the Union abandoned or agreed to give up bargaining rights.

violation of Sections 8(a)(1) and (5) of the Act. N.L.R.B. v. Katz, supra. This conclusion is unaffected by the change in stock ownership of the Company. See N.L.R.B. v. Burns Security Services, Inc., 406 U.S. 272, 80 LRRM 2225 (1972).

II. *Threats of Reprisals*

The Board held that the Employer violated Section 8 (a)(1) of the Act by interfering with its employees' organizational rights guaranteed under Section 7, 29 U.S.C. § 157,[8] Finding that its officers had coercively interrogated and threatened certain employees concerning Union-related activities. This conclusion is fully supported by undisputed facts and evidence in the record. During December, 1973, Lasaponara, then president of the Company, held a series of meetings with his employees whom he interrogated in his office, two at a time, concerning the reasons why they wanted or thought they needed a union. Crediting the testimony of certain of these employees while rejecting Lasaponara's corresponding denials, the Administrative Law Judge determined that at some of these meetings Lasaponara made undisguised threats of reprisal to employees for assisting or being sympathetic to the unionization drive under way at Oriskany. Lasaponara told several employees that if they helped the Union "he would fix them." He told others that he could not give them their scheduled raises so long as they dealt with the Union. Similarly, a supervisor of the Company, John Kosh, stated to one em-

[8] 29 U.S.C. § 157 provides:

"Employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

ployee in November, 1973, that "it would be futile for the employees to select the Union since the employer would not accept the Union as an agent for the employees."[9] In addition, it was found by the Administrative Law Judge that on two occasions early in 1974 production manager Fazzino[10] questioned several employees about the identity of those who had been active in promoting the Union or had signed authorization cards on its behalf and whether any and Union meetings had taken place. Fazzino was also found to have crumpled and thrown on the floor a petition signed by several employees protesting the scheduling of work on Palm Sunday and calling the employee who had presented him with it, Eva Wilson, Chairman of the Union shop committee, a "troublemaker."

These actions taken by the president of the Company and its production manager and supervisor constitute archetypal Section 8(a)(1) violations since they "were calculated to frustrate the union's organization campaign by instilling fear of reprisals in the employees." N.L.R.B. v. L. E. Farrell Co., Inc., 360 F.2d 205, 207, 62 LRRM 2130 (2d Cir. 1966). The president of the Company called the employees into his office and there questioned and explicitly threatened them concerning the Union. A clearer example of coercive interrogation would be difficult to imagine. See, N.L.R.B. v. Gladding Keystone Corp., 435 F.2d 129, 76 LRRM 2099 (2d Cir. 1970); N.L.R.B. v. Milco, Inc., 388 F.2d 133, 67 LRRM 2202 (2d Cir. 1968). Fazzino's requests for the names of those who have signed authorization cards plainly indicated to the interrogated employees that open

[9] Respondents do not dispute the fact that Kosh was a supervisory employee within the meaning of Section 2(11) of the Act, 29 U.S.C. § 152(11). An employer may be held liable for coercive statements made by supervisory personnal. See, e.g., Irving Air Chute Co. v. N.L.R.B., 350 F.2d 176, 179, 59 LRRM 3052 (2d Cir. 1965).

[10] Fazzino was also Lasaponara's partner in the business.

support of the Union would undoubtedly place one in an unfavorable light with the Employer in contrast to those employees who refrained from exercising their statutory rights. That this would be the case was dramatically demonstrated when Fazzino called Eva Wilson a "troublemaker" and threw the proffered petition on the ground. Similarly, Kosh's remark about the purported futility of supporting the Union could have had no other purpose but to discourage such an effort by the employees. These kinds of statements by employers' agents are prohibited by Section 8(a)(1). See, N.L.R.B. v. Long Island Airport Limousine Service Corp., 468 F.2d 292, 296-97, 81 LRRM 2445 (2d Cir. 1972); N.L.R.B. v. Gerbes Super Markets Inc., 436 F.2d 19, 76 LRRM 2348 (8th Cir. 1971); N.L.R.B. v. International Metal Specialties, Inc., 433 F.2d 870, 75 LRRM 2568 (2d Cir. 1970), cert. denied, 402 U.S. 907, 76 LRRM 3028 (1971); Synder Tank Corp. v. N.L.R.B., 428 F.2d 1348, 74 LRRM 2626 (2d Cir.), cert. denied, 400 U.S. 1021, 76 LRRM 2272 (1970); Federation of Union Representatives v. N.L.R.B., 339 F.2d 126, 129-30, 57 LRRM 2547 (2d Cir. 1964).

III. *Discharge of Employees for Engaging in Protected Concerted Activities*

Palm Sunday is customarily a work day for the Company since it falls one week before Easter Sunday and the Easter season is one of the biggest of the year in the cheese industry. Given the increased demand for its product and the short shelf life of certain types of cheese the Company has found it necessary to lengthen the work week to seven days at this time of the year. On Friday, April 5, 1974 the Chairman of the Union shop committee presented plant manager Fazzino with a petition signed by twelve of the Company's twenty employees protesting the scheduling of Palm Sunday, April 7 as a work day. The petition stated:

"Since this is a religious holiday that is important to us, we request that this schedule be rescinded.

"In the event that this schedule is not changed, you are advised that we will not report for work on Palm Sunday, April 7, 1974, but will report to work on Monday, April 8, 1974."

On Saturday, April 6 Fazzino received a telephone call from Union representative DeBella concerning the petition. Fazzino told DeBella that "everyone knows we have to work" on Sunday and refused to accede to the demand that the schedule be changed. DeBella reiterated the signatory employees' objection to working on a religious holiday and stated that they would be willing to work overtime the following week. Fazzino rejected this offer as unsatisfactory and the conversation was terminated. The next day, Palm Sunday, six of the petitioners failed to appear for work. They did report for work the next day however and nothing further was said. On June 7, 1974, two months later, the Employer fired these employees for their refusal to work on Palm Sunday. We agree with the Board that these discharges interfered with the employees' right, statutorily protected by Section 7 of the Act, to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection" thereby violating section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1).

Discharge of employees for engaging in concerted activities protected by Section 7 is an unfair labor practice. N.L.R.B. v. Washington Aluminum Co., 370 U.S. 9, 50 LRRM 2235 (1962); Shelly & Anderson Furniture Manufacturing Co., Inc. v. N.L.R.B., 497 F.2d 1200, 86 LRRM 2619 (9th Cir. 1974); First National Bank of Omaha v. N.L.R.B., 413 F.2d 921, 71 LRRM 3019 (8th Cir. 1969); N.L.R.B. v. Morris Fishman and Sons, Inc., 278 F.2d 792, 46 LRRM 217" (3d Cir. 1960); N.L.R.B. v. M&M Bakeries, Inc., 271 F.2d 602, 45 LRRM 2085 (1st Cir. 1959). The one day strike or work stoppage by the discharged employees

in support of their petition protesting the Palm Sunday schedule is statutorily protected because it constituted concerted activity aimed at changing working conditions at the plant. See N.L.R.B. v. Leprino Cheese Co., 424 F.2d 184, 73 LRRM 2865 (10th Cir.), cert. denied, 400 U.S. 915, 75 LRRM 2565 (1970). While the strike undoubtedly brought inconvenience and economic loss to the Company in view of its unusually heavy production schedule due to the Easter season, such a result is obviously the very object of any concerted employee action protected by the Act. Although it is true that not all concerted employee activities are protected by Section 7, see N.L.R.B. v. Washington Aluminum Co., supra, at 17, the economic pressure brought to bear here, unlike that present in the narrow class of cases relied on by respondents, clearly failed to reach a degree so grossly disproportionate to the goal sought to be achieved that it renders the conduct unprotected and thereby justifies discharge of the participating employees. In N.L.R.B. v. Marshall Car Wheel & Foundry Co., 218 F.2d 409, 411, 35 LRRM 2320 (5th Cir. 1955) cited by respondents, the planned employee walk-out held to be unprotected occured at the moment molten iron was ready to be poured and this action "might well have resulted in substantial property damage" to the plant. Similarly in Dobbs Houses, Inc. v. N.L.R.B., 325 F.2d 531, 54 LRRM 2726 (5th Cir. 1963) a mass departure of waitresses at the dinner hour to protest the discharge of a supervisor was held unprotected by Section 7. See also, N.L.R.B. v. Local Union No. 1229, Int. Brotherhood of Electrical Wkrs., 346 U.S. 464, 33 LRRM 2183 (1953); Southern Steamship Co. v. N.L.R.B., 316 U.S. 31, 10 LRRM 544 (1942). The employees' conduct in the instant case was not simply an attempt to deliberately inflict economic harm on the Company without compensatory gain to themselves. It served a legitimate work-related goal and was therefore protected by the Act.

Respondents' reliance on Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50,

88 LRRM 2660 (1975) is also misplaced. In Emporium a minority group of employees, dissatisfied with their union's reliance upon the existing collective bargaining agreement's grievance procedure refused to participate in it and, acting contrary to the union's advice picketed their employer's store in an attempt to circumvent the union and bargain separately with the company over the terms and conditions of employment with respect to racial minorities. The Court held such conduct to be unprotected by Section 7 because it undercut the statutory principle of exclusive representation embodied in Section 9(a) of the Act, 29 U.S.C. § 159(a). In the instant case, however, there is no evidence that the Palm Sunday strikers were at odds with or attempting to by-pass their Union. Indeed, Union representative DeBella spoke to Fazzino before the strike and stated, in effect, that the Union supported the employees in this effort. Under these circumstances, Emporium is inapposite.[11]

IV. *Refusal to Rehire Employee Muraca Because of Union Activities*

Peter Muraca, who had been active in the Union's organization drive, was discharged for cause by the Company in December, 1973. According to Muraca's testimony which the Administrative Law Judge credited, on May 27, 1974 Muraca went to the plant and asked Fazzino if the Company would rehire him. Fazzino told him, "I know we need people, I have to wait until this union thing gets settled . . . you got me in trouble and some guy from the Board [NLRB] had a meeting with [Fazzino] and [Oddi]." Fazzino did not call Muraca as he had promised and Muraca

[11] In view of our holding that the employees' conduct was protected by Section 7, we do not reach the question whether by taking no action against the strikers for two months the Company condoned their action. See Confectionery and Tobacco Drivers and Warehousemen's Union, Local 805 v. N.L.R.B., 312 F.2d 108, 52 LRRM 2163 (2d Cir. 1963).

returned on June 10. At that time Fazzino again stated that he would contact Muraca in the future about rehire but he never did. Given this uncontradicted testimony and the evidence of Muraca's earlier support of the Union the Board concluded that the Company's failure to rehire Muraca was based on his Union-related activities in violation of Section 8(a)(3) and (1).[12] See, Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 8 LRRM 439 (1941); Marlin-Rockwell Corp. v. N.L.R.B., 133 F.2d 258, 11 LRRM 1108 (2d Cir. 1943). This determination is supported by substantial evidence in the record. Respondents attack Muraca's credibility but, of course this is a question to be determined at the Board hearing not in the Court of Appeals.

Enforcement granted.

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[12] Section 8(a)(3), 29 U.S.C. § 158(a)(3) provides in relevant part:

"(a) It shall be unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ."

APPENDIX B

(Received June 30, 1975)

218 NLRB No. 168 D—9836
Oriskany, N.Y.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 3—CA—5634

A. Lasaponara & Sons, Inc.,
A Wholly Owned Subsidiary of ERE Industries, Inc.

and

Mechanics Educational Society of America, AFL-CIO

Case 3—CA—5708

A. Lasaponara & Sons, Inc.,
A Wholly Owned Subsidiary of ERE Industries, Inc.
and ERE Industries, Inc.

and

Mechanics Educational Society of America, AFL-CIO

Decision and Order

On November 22, 1974, Administrative Law Judge Jerry B. Stone issued the attached Decision in this proceeding. Thereafter, Respondents filed exceptions and a supporting brief, and General Counsel filed an answering brief.[1]

[1] We note that on February 3, 1975, the General Counsel filed as part of its answering brief to Respondents' exceptions his motion to correct transcript which earlier had been filed with the Administrative Law Judge. In this regard we note that on October 29, 1974, the Administrative Law Judge granted the General Counsel's motion to correct the transcript and we hereby affirm the Administrative Law Judge's ruling in this respect.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions [3] of the Administrative Law Judge and to adopt his recommended Order,[4] as modified.

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[2] The Administrative Law Judge found, *inter alia*, that Sec. 8(a)(1) of the Act was violated by the actions of Production Manager Fazzino, on April 5, 1974, in crumpling a petition protesting the scheduling of work and in informing employee Wilson that she was a troublemaker after she presented the petition to him. While we agree that the singling out of Wilson and calling her a troublemaker violates Sec. 8(a)(1), we do not find that Fazzino's crumpling of the petition, in the circumstances herein, additionally violates Sec. 8(a)(1). In this regard, the record reveals that on April 6 Fazzino spoke with Union Business Agent DeBella, and explained to DeBella his reasons for wanting the employees to work the scheduled day, Palm Sunday. He informed DeBella that the empoyees should have given advance notice that they wanted the day off. Thus, we do not find, as did the Administrative Law Judge, that Fazzino's conduct reveals a rejection of the principles of collective bargaining.

[3] In the absence of exceptions thereto, we adopt *pro forma*, the Administrative Law Judge's dismissal of the allegation that the discharge effectuated on June 7, 1974, violated Sec. 8(a)(3) of the Act.

[4] The recommended Order of the Administrative Law Judge omits the requirement that Respondents cease and desist from making unilateral changes in existing benefits and other terms and conditions of employment for unit employees. We shall correct this omission.

In addition, since it has been found that on or about April 23, 1974, ERE Industries, Inc., purchased A. Lasaponara & Sons, Inc., and Lasaponara became a wholly owned subsidiary of ERE, we perceive no necessity for separate Orders as fashioned by the Administrative Law Judge. Accordingly, we shall so modify the Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified, and hereby orders that Respondents A. Lasaponara & Sons, Inc., a wholly owned subsidiary of ERE Industries, Inc., Oriskany, New York, and/or ERE Industries, Inc., Medford, Massachusetts, their officers, agents, successors, and assigns, shall take the action set forth in said recommended Order as modified below:

1. Delete Part B.

2. Substitute the following for the introductory paragraph:

"Respondents, A. Lasaponara & Sons, Inc., a wholly owned subsidiary of ERE Industries, Inc., and/or ERE Industries, Inc., their officers, agents, successors, and assigns, shall:"

3. Insert the following as paragraph 1(e) and reletter former paragraph 1(e) as 1(f):

"(e) Unilaterally changing existing benefits and other terms and conditions of employment of employees in the appropriate bargaining unit found herein."

4. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C., June 30, 1975.

JOHN H. FANNING, Member
HOWARD JENKINS, JR., Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

CHAIRMAN MURPHY, dissenting in part:

I differ with the decision of my colleagues in only one respect. I would base no violation findings on any part of the evidence depicting the reactions of Production Manager Fazzino on April 5, 1974, when Wilson, who had identified herself as the chairman of the employee committee sponsoring the work scheduling protest, presented the employees' petition to him. It seems to me that the same considerations which militate against finding anything unlawful in Fazzino's crumpling of the petition also militate against finding anything unlawful in the remark which accompanied that action. In any event, I am unable to read in Fazzino's comment to Wilson that she was "a troublemaker" a threat of reprisal to her.

In all other respects, I concur in the decision of my colleagues.

Dated, Washington, D.C., June 30, 1975.

BETTY SOUTHARD MURPHY, Chairman
NATIONAL LABOR RELATIONS BOARD

D—9836

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT threaten our employees with reprisals to dissuade them from supporting the Union.

WE WILL NOT coercively interrogate our employees concerning their union membership, activities, or desires.

WE WILL NOT unilaterally change existing benefits and other terms and conditions of employment of employees in the appropriate bargaining unit found herein.

WE WILL NOT refuse to bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit herein found to be approved.

WE WILL NOT refuse to hire, will not discharge, or otherwise discriminate against employees in regard to hire or tenure of employment, in order to encourage or discourage membership in a labor organization or to interfere with, restrain, or coerce employees in the exercise of Section 7 rights, except to the extent that such rights may be affected by lawful agreements in accord with Section 8(a)(3) of the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce the employees of A. Lasaponara & Sons, Inc., a wholly owned subsidiary of ERE Industries, Inc., in the exercise of their rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by lawful agreements in accord with Section 8(a)(3) of the Act.

WE WILL, upon request, bargain with Mechanics Educational Society of America, AFL-CIO, as the exclusive collective-bargaining representative of our employees in the unit herein found appropriate and embody any understanding reached in a signed agreement. The appropriate bargaining unit is:

> All production and maintenance employees, employed by A. Lasaponara & Sons, Inc., a wholly owned subsidiary of ERE Industries, Inc., at its Base Road, Orisłany, New York, location; excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL, if required by the Union, rescind the unilateral changes, made around May 1974, and thereafter, in benefits of employment of the employees in the appropriate bargaining unit, set forth above, provided, however, absent such request by the Union, there is no requirement for a rescinding of such changes in benefits.

WE WILL offer to Peter Muraca immediate employment to the position for which he was discriminatorily considered on May 27, 1974, or, if such position no longer exists, to a substantially equivalent position, and make him whole for any loss of pay suffered by reason of the discrimination against him.

WE WILL offer to Eva Wilson, William Bonville, Robert Kraeger, Margaret Peck, Richard Hayes, and Gary Bartle immediate and full reinstatement to his or her former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his or her seniority or other rights previously enjoyed, and make each whole for any loss of pay suffered by reason of his or her unlawful discharge.

All of our employees are free to become or remain, or refrain from becoming or remaining, members of any labor

organization except to the extent that such rights may be affected by lawful agreements in accord with Section 8 (a)(3) of the Act.

A. LASAPONARA & SONS, INC.,
A WHOLLY OWNED SUBSIDIARY OF
ERE INDUSTRIES, INC.
(Employer)

Dated .....

By .....
(Representative) (Title)
ERE INDUSTRIES, INC.
(Employer)

Dated .....

By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 901 Federal Building, 111 West Huron Street, Buffalo, New York 14202, Telephone 716-842-3100.

APPENDIX C

JD-724-74
Oriskany, N.Y.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

Case No. 3-CA-5634

A. LASAPONARA & SONS, INC.,
A WHOLLY OWNED SUBSIDIARY OF ERE INDUSTRIES, INC.

and

MECHANICS EDUCATIONAL SOCIETY OF AMERICA, AFL-CIO

Case No. 3-CA-5708

A. LASAPONARA & SONS, INC.,
A WHOLLY OWNED SUBSIDIARY OF ERE INDUSTRIES, INC.
AND ERE INDUSTRIES, INC.

and

MECHANICS EDUCATIONAL SOCIETY OF AMERICA, AFL-CIO

Francis J. Novak, Jr., Esq.,
for the General Counsel.

Mr. James Kozma and
Mr. James DeBella, Rome, N.Y.,
for the Union (Charging Party).

Rolland R. Benzow, (*Benzow, Finck, Handel, Barrett & Owens*),
Buffalo, N.Y., for the
Respondent Employer.

JD-724-74

Decision

Statement of the Case

JERRY B. STONE, Administrative Law Judge: This proceeding, under Section 10(b) of the National Labor Relations Act, as amended, was tried pursuant to due notice on September 11 and 12, 1974, at Rome, New York.

As to Case 3-CA-5634, the original charge was filed on April 10, 1974, the amended charge was filed on May 31, 1974, and the complaint was issued on June 14, 1974.

As to Case 3-CA-5708, the original charge was filed on June 12, 1974, the first amended charge was filed on July 23, 1974, the second amended charge was filed on July 26, 1974, and the complaint was issued on July 29, 1974.

Cases Nos. 3-CA-5634 and 3-CA-5708 were duly consolidated for hearing by Order dated July 29, 1974.

The issues concern (1) whether Respondents have violated Section 8(a)(1) of the Act by acts of interrogation, statements, threats, promises of benefits, discharges of and refusal to hire certain employees, and refusal to bargain with the Union; (2) whether Respondents have violated Section 8(a)(3) of the Act, by discharges of and refusal to hire certain employees, and (3) whether Respondents have violated Section 8(a)(5) of the Act by refusal to bargain with the Union.

All parties were afforded full opportunity to participate in the proceeding, and the General Counsel and the Respondent have filed briefs which have been considered.

Upon the entire record in the case and from my observation of witnesses, I hereby make the following:

Findings of Fact

I. The Business of the Employer[1]

A. Lasaponara & Sons, Inc., herein sometimes called simply Lasaponara, is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of New York. At all times material herein, Lasaponara has maintained its principal office and place of business at RD #1, Phillipsburg Road, in the City of Goshen, and State of New York, herein called the Goshen plant, and at Base Road in the City of Oriskany, and the State of New York, herein called the Oriskany plant, and is, and has been at all times material herein, engaged at said plants and locations in the manufacture and wholesale distribution of cheese and related products. During a recent 1 year period, Lasaponara in the course and conduct of its business operations, manufactured, sold, and distributed at said Oriskany plant, products valued in excess of $50,000 of which products valued in excess of $50,000 were shipped from said plant directly to States of the United States other than the State of New York.

ERE Industries, Inc., herein sometimes called simply ERE, is engaged in the manufacture and wholesale distribution of cheese and related products in Medford, Massachusetts. On April 23, 1974, ERE purchased Lasaponara, and Lasaponara became a wholly-owned subsidiary of ERE.

Based upon the foregoing and as conceded by the Respondents, Lasaponara and ERE each is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(5) of the Act.

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[1] The facts are based upon the pleadings and admissions therein.

II. The Labor Organization Involved[2]

Mechanics Educational Society of America, AFL-CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act. It is so concluded and found.

III. The Unfair Labor Practices

A. *Preliminary Issues*

Supervisory Status[3]

At all times material herein, the following-named persons occupied positions set opposite their respective names, and have been and are now agents of Lasaponara and ERE, acting on their behalf, and are supervisors within the meaning of Section 2(11) and 2(13) of the Act.

Frank Oddi—President of ERE— President of Lasaponara since April 23, 1974

Joseph Lasaponara—President of Lasaponara until April 23, 1974—Sales Manager—Lasaponara since April 23, 1974

Anthony Fazzino—Plant Manager—at Lasaponara Oriskany Plant

John Kosh-Foreman—at Lasaponara Oriskany Plant until April, 1974

B. *The Refusal to Bargain*

1. The parties are in agreement as to the appropriate collective bargaining unit of Respondents' employees involved in this proceeding. Thus, based upon the pleadings and statements (at the hearing) narrowing the issues, it

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[2] The facts are based upon the pleadings and the narrowing of issues at the hearing.

[3] The facts are based upon the pleadings, admissions therein, and statements narrowing the issues at the hearing.

is concluded and found that "all production and maintenance employees, employed by A. Lasaponara & Sons until April 23, 1974, and since that time by A. Lasaponara & Sons, a wholly-owned subsidiary of ERE Industries, Inc., at its Base Road, Oriskany, New York location; excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act" constitutes a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

2. The parties stipulated to the effect that there were 20 employees in the appropriate collective bargaining unit, described above, and that 11 of such employees had signed proper union authorization cards, designating the Union as the employees' collective bargaining representative, by on or about December 1, 1973. Accordingly, it is concluded and found that on or about December 1, 1973, a majority of the employees of A. Lasaponara & Sons, Inc., in the unit described above, designated or selected the Union (Mechanics Educational Society of America, AFL-CIO) as their representative for the purpose of collective bargaining with A. Lasaponara & Sons, Inc.

3. The facts reveal that the Union, on December 3, 1973, requested A. Lasaponara & Sons, Inc., to bargain collectively with respect to rates of pay, hours of employment, and other terms and conditions of employment as the exclusive collective bargaining representative of all of the employees of the Respondent in the bargaining unit described in Sec. III B1 above.

4. A. Lasaponara & Sons, Inc., and ERE Industries, Inc., had been in negotiations since August, 1973, for the sale of controlling ownership interest in A. Lasaponara & Sons, Inc., a family owned corporation, was so involved in December, 1973, continued such negotiations, reached firm understanding as to such sale in March and early April 1974, and completed the sale of such interests to ERE on April 23, 1974.

5. Oneida Development Corporation and its head, a Mr. Zappone, had been instrumental in the initial location by A. Lasaponara & Sons, Inc., of a plant at Oriskany, New York. Such Oneida Development Corporation had an interest and some influence with respect to any sale of ownership interest by A. Lasaponara & Sons, Inc., because of its needed approval of certain financial involvements or releases.

6. The Union, on December 5, 1973, filed a standard NLRB Representative Petition (Case No. 3-RC-5913) with Region 3 of the National Labor Relations Board.[4]

7. The Union, on December 7, 1973, transmitteed a letter to A. Lasaponara & Sons, Inc., in which the Union notified the company of certain employees on the Union's organizational committee.

8. Joseph Lasaponara, President of A. Lasaponara & Sons, Inc., contacted Zappone of the Oneida County Development Corporation with respect to the Union letters and petition referred to above, and requested Zappone to contact the Union for the Lasaponara interests.

9. Tom Zappone, of the Oneida Development Corporation, met with union officer Kozma and Debella on December 10, 1973, told the union officials that the Oneida Development Corporation had built the plant, helped finance the plant, and had been instrumental in bringing Lasaponara into Oneida County. Zappone told the union officials that the Lasaponara Company was involved in discussions with some other company about merging and that an election or union at this time could jeopardize the operation and cause the loss of jobs for 20 people.[5] The

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[4] Such position invokes the NLRB investigation of questions concerning representation and the holding of elections and issuance of certifications thereto when appropriate.

[5] I credit Kozma's testimony to the effect that the word "merging" was used. Joseph Lasaponara and Fazzino testified to the

union officials told Zappone that they did not want to drive anyone out of business, that they, however, had to protect the interests of the employees who had joined the Union, that they thought that if they could sit down with the Lasaponara principals, they could work out the problems.

10. Later, a meeting between the union officials and Lasaponara officials was arranged by Zappone for December 12, 1973. At such meeting were Zappone, Joseph Lasaponara and Fazzino for the Company, and Kozma and DeBella for the Union.

The parties discussed the fact that A. Lasaponara & Sons, Inc., was involved in discussions with another company concerning the sale of the ownership interest in A. Lasaponara & Sons, Inc., to another company.[6] Joseph Lasaponara told the union officials in effect that he had no objection to a union being in his plant, however, that this was not the time for such to be since an election could affect production and upset the sale or merger.[7]

The union officials (Kozma and DeBella) told Lasaponara that the question of an election did not present a problem, that there were other ways to handle the question

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effect that in the conversations in which they were involved on December 12 and 14, 1974, that the term "sale" was used. What actually was involved was the sale of ownership interest and the merging of the Lasaponara Corporation at the time of such sale into the ERE enterprise as an entity.

[6] Whether the words "sale" or "merge" was used is not material since I am persuaded that enough details were discussed about the transaction to warrant an interpretation by Kozma and DeBella that the Lasaponara Company was to be merged into the other company.

[7] The facts relating to the events of December 12 and 14, 1973, are based upon a composite of the credited aspects of the testimony of Kozma, DeBella, Lasaponara and Fazzino, the exhibits (including the December 20, 1973, proposed recognition agreement) and the logical consistency of all of the facts.

of recognition.[8] The union officials told Lasaponara in effect that the question of an election would be solved if the company would recognize the Union, give a 25 cent wage increase, and that a contract could be formalized later. Lasaponara inquired at this point as to what the employees were interested in as regards a contract. DeBella, for the Union, made notes of certain proposals, read the proposals to Lasaponara, and Lasaponara made notes of such proposals. Lasaponara and Fazzino [9] told the union officials that they would think about the proposals and let them know.[10]

11. Joseph Lasaponara met with the union officials on December 14, 1973. Lasaponara told Kozma and DeBella that he was not ready to sign a contract at this time, that he did not want a long term but a shorter term contract, that 25 cents an hour increase in wages was too much, and that he could live with 20 cents an hour wage increase if he received credit for it when he bargained for a full contract.

The parties discussed and agreed in effect to a wage increase, continuation of the past practice of wage increases, and the availability of other benefits to employees in re-

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[8] I discredit Lasaponara's testimony to the effect that the union officials indicated an uncertainty as to how to dispose of the representative petition. Fazzino's testimony supports Kozma's and DeBella's testimony as to what occurred. Considering this and the logical consistency of the facts, I find the facts as set forth.

[9] Fazzino, in addition to being production manager, was an in-law and part owner of the family owned (A. Lasaponara & Sons, Inc.) corporation.

[10] At some point in the discussion, it appears that Lasaponara adverted to the fact that he needed time to complete his merger discussions and that such time needed was estimated to be until some time in February or March, 1974.

turn for Lasaponara's agreement to formally recognize the Union at a future date, April 1, 1973.[11]

Excepting with respect to the agreement to recognize in the future, more precise details of the agreement reached on December 14, 1973, are revealed by the following credited excerpts from Kozma's testimony:

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A. We thought that we could live with the twenty cents an hour provided of course that he continued the past practice of granting increases every three months and also making the Welfare Program, Hospitalization and what not available to employees after they had been there six months. He also wanted to know if at that time, if the twenty cents an hour would be—if he get credited for it when he negotiated the complete contract.

Q. Was there a discussion when a complete contract would be negotiated?

A. Yes, at that meeting and prior meetings there is a time element they thought they had to have and we talked about a February date, a March 1st date and I think on that date, March 1st, we weren't quite sure whether that would be time enough to consumate their negotiation or whatever they were doing and we suggested the middle of March or lets make it

[11] The fact that the agreement was to formally recognize the Union in the future is based upon a composite of all the credited facts, the credited aspects of Lasaponara's testimony, and the proposed recognition agreement drafted by the Union and presented on December 20, 1973. The overall facts clearly reveal an agreement of recognition. Lasaponara's testimony reveals an agreement to recognize the Union. The proposed draft reveals that the agreement was for future recognition. Considering the logical consistency of all the facts, I discredit Lasaponara's testimony to the effect that ultimate recognition was contingent upon his failure to sell the business.

April 1st. We told them we would prepare a recognition agreement and withdraw the Petition for an election with the National Labor Relations Board.

Q. Did he give any response when you told him that?

A. He said fine, then we will formulize it, we could do that at the plant and we were going to set up a date or we did set up a date for about the 20th and this is going to be formulized where Mr. Fazzino who is the Plant Manager and a brother-in-law to Mr. Lasaponara, would formulize it and we go on from there.

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12. On December 20, 1973, union officials Kozma and DeBella and certain employees (Wilson, Muraca, Bonville and Krager) met with Production Manager Fazzino. At such time Kozma signed a document relating to recognition, had certain employees to witness the document, and gave the document to Fazzino for transmittal to Joseph Lasaponara. Such document is as herein set out:

Recognition Agreement

by and between

LASAPONARA & SONS, INC.

and

MECHANICS EDUCATIONAL SOCIETY OF AMERICA
AFL-CIO

Effective April 1, 1973, Lasaponara & Sons, Inc. will recognize the Mechanics Educational Society of America, AFL-CIO as the sole collective bargaining agency on behalf of the employees employed at its plant located on Base Road, Oriskany, N.Y. for rates of pay, wages, hours of work and any other conditions of employment.

By .....

By .....

WITNESS

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Dated ..... day of ....., 1973

Fazzino told Kozma and the employees that the company was having problems, and it would take time to iron out the problems and that the employees would get 20 cents an hour raise on the day before Christmas. Fazzino also told Kozma and the employees that he would send the "document" to Joseph Lasaponara for signature.

Kozma told Fazzino that Eva Wilson was the chairlady of the employee committee, that if there were any problems, Fazzine should work with her, and gave Fazzino

a telephone number for DeBella, told Fazzino that if there were any additional problems that Fazzino could contact DeBella.

13. On December 20, 1973, the Union mailed an executed "withdrawal request" (in Case 3-RC-5913) to the Regional Director for Region 3 of the NLRB, and said "withdrawal request" was approved by the Regional Director on December 26, 1973, the date of the scheduled hearing in such representation proceeding.

14. On December 24, 1973, the Respondent put into effect the 20 cents an hour raise increase previously referred to.

15. On January 14, 1974, the Union sought withdrawal of a representation petition concerning Respondent's employees that it had filed with the New York State Labor Department. Such request was granted on February 8, 1974.

16. In the meantime, during mid-December, the last of December, 1973, and the first of January, 1974, the Respondent, by its agents Joseph Lasaponara and Fazzino, interfered with, restrained, and coerced employees in the exercise of Section 7 rights, and thereby violated Section 8(a)(1) of the Act by interrogating employees as to why they wanted a union, and by telling employees in effect that they could not get raises because of the pendency of the union question.[13]

17. As to the proposed written agreement for recognition and Lasaponara's failure to return the instrument in an executed state, I note the following. Union official DeBella telephoned Production Manager Fazzino shortly after January 1, 1974, and inquired as to why he had not received such instrument. Fazzino told De-

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[13] Such conduct, and other conduct violative of Section 8(a)(1) of the Act, is set out in Section *III C* of this Decision.

Bella that because of the holidays there had been a delay, that he had not been able to get the document to Joseph Lasaponara, that he would do so, and that the Union would be hearing from Lasaponara.

On February 5, 1974, DeBella for the Union spoke to Fazzino about some employee complaints concerning health insurance coverage and the fact that some employees had not received their automatic wage increase. On such occasion DeBella again spoke to Fazzino about the fact that the Union had not received the executed "agreement to recognize." Fazzino told DeBella that he did not receive an executed agrement, that it must be because Joseph Lasaponara had been busy.[13]

On February 6, 1974, DeBella contacted Zappone, for the Oneida Development Corporation, and requested help in arranging a meeting with Lasaponara. Zappone indicated that he would and later indicated that he was unable to arrange a meeting at the time.[14]

18. In the meantime Joseph Lasaponara was in contact with Oddi, President of ERE, during the middle of January, 1974. Lasaponara told Oddi that there had been some union activities but that the same was under control.

19. Around February 28 or March 1, 1974, DeBella again contacted Fazzino of the Respondent and discussed the question of a layoff of certain employees, including several of the employees on the union committee. The

[13] Fazzino testified to the effect that this conversation took place on January 25, 1974. The exact timing does not appear material. I found DeBella, however, to appear to be a more accurate witness, and find the facts as set forth.

[14] Kozma, the other union official, was away on vacation for several days after December 20, 1973, was back for approximately 3 weeks in January, 1974, and was on vacation in February, 1974. Kozma left the question of following up as to the "recognition" to DeBella.

gist of DeBella's conversation was a contention that the layoff was improper, that the girls could not be laid off because they were for the Union, that the girls could not be laid off because of sex, and that the Respondent should reconsider or the Union would file charges.

Fazzino discussed the matter with Joseph Lasaponara, and the "layoff" was not effectuated.[15]

20. On March 5, 1974, DeBella, for the Union, spoke to Joseph Lasaponara about grievances, employee problems concerning insurance, automatic wage increases, and a "proper rate" for one employee. Lasaponara suggested that De Bella put these grievances in writing. DeBella, thereafter, on March 8, 1974, gave Fazzino a letter dated March 8, 1974, referring to such grievances for deliverance to Joseph Lasaponara.

In the meantime, Joseph Lasaponara was in contact with Oddi, for ERE, and related the fact that the Union was contacting the Respondent concerning grievances. Oddi told Lasaponara, in effect, to be very creful, that he was not authorized to bind ERE Industries without their knowing about the matter.

DeBella later attempted to contact Joseph Lasaponara. Being unsuccessful in contacting Lasaponara, DeBella contacted Zappone, of the Oneida Development Corporation. Zappone told DeBella in effect about Oddi, and ERE Industries' involvement in the purchase of the ownership interests in Lasaponara, and gave DeBella a telephone number for contacting Oddi.

DeBella, around April 1, 1974, placed a telephone call to Oddi, did not reach Oddi himself, but left a message for Oddi to call DeBella. Oddi was apprised of such

[15] The question of whether the proposed layoff was discriminatory is not an issue.

telephone call, knew that the call was from the Union, and did not call DeBella or the Union.

21. As has been indicated, A. Lasaponara & Sons, Inc., and ERE Industries, Inc., had been in negotiations since August, 1973, as to the sale or purchase of the ownership interests in A. Lasaponara & Sons, Inc. The final closing of such transaction was supposed to be in March, 1974. The facts are revealed in effect by the following credited excerpts from Oddi's testimony.

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A. Yes. The finite closing was to have taken place in March of 1974. To elaborate a little if you wish me to, the closing was to have taken place earlier than that but for reasons I could go into or not, it did not but the papers were finally prepared and signed on March the 6th, March the 7th, 1974, pending receipt of one document which was of critical importance and without that document this closing would not have been completed. So why we were waiting for that document, everything had been signed and was held in escrow and the—then the document was finally received and escrow dispursed on April 23rd.

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22. In the meantime, on March 27, 1974, Oddi addressed the employees of A. Lasaponara & Sons, Inc., told them in effect that he would be the new president of A. Lasaponara & Sons, Inc., and that the benefits of the parent company, ERE Industries, Inc., would be extended to employees of A. Lasaponara & Sons, Inc. Oddi told the employees in effect that some of the changes would be effective as of May 1, 1974, and that the others would be effectuated at a later date.

23. On May 1, 1974, as Oddi had told the employees, certain changes in benefits were placed in effect. Since

that date and prior to September 11, 1974, other changes in benefits have been effected so as to extend the employee benefits of the parent company to the employees of A. Lasaponara & Sons, Inc. Thus, it is clear that the Respondents have changed the benefits of employees of A. Lasaponara & Sons, Inc., as regards holidays, sick days, bereavement, health and life insurance.[16]

Contentions

CONCUSIONS

The General Counsel alleges and contends that (1) A. Lasaponara & Sons, Inc., on December 14, 1973, voluntarily recognized the Union as the exclusive collective bargaining representative of the employees in the appropriate bargaining units; (2) A. Lasaponara & Sons, Inc., on or about early April, 1974, withdrew recognition from the Union; and (3) that A. Lasponara & Sons, Inc., a wholly owned subsidiary of ERE Industries, Inc., refused to bargain collectively with the Union by unilaterally changing conditions of employment.

The Respondent contends in effect that the Union agreed to abandon and did abandon its bargaining rights in December, 1973 and January, 1974, and that ERE was unaware of what had transpired and therefore was not obligated to bargain with the Union as to the "unilateral" changes.

Considering all of the foregoing, I find that the facts support the General Counsel's contentions and do not support the Respondent's contentions. Thus, the facts

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[16] The exact details are not important since such details are a matter easily determined in compliance. I note as an example that the General Counsel contends that vacation benefits were changed. Although employee Wilson testified to the effect that the employees were told about vacation benefits, the evidence does not reveal what, if any, were the former vacation benefits.

reveal that the Union was designated as the collective bargaining representative by a majority of the employees in the appropriate bargaining unit. The facts are clear that the employing entity, in December, 1973, had no question as to the union's majority status but in fact agreed that such status existed. Thus, the employer's action in agreeing to recognize the Union in the future, without other evidence as to majority status, clearly fixes the Union as the recognized exclusive collective bargaining agent of the employees involved. Contrary to Respondent's contentions, the facts do not reveal that the Union abandoned or agreed to give up bargaining rights. The withdrawal of representation petitions under the circumstances of agreements to recognize do not reveal abandonment or waiver of bargaining rights. Rather, the facts reveal that the employer and union agreed to keep the matter of formal recognition and formal contracts in abeyance until the "sale" or "merger" of the employer's controlling ownership interest had been determined. The credited facts reveal that the employing entity has remained the same and that the obligation to recognize the Union has continued. Since the agreement to hold formal recognition and formal contracts in abeyance was contingent upon the "sale" or "merger" completion, and since such act of "sale" or "merger" occurred on April 23, 1974, the employing entity's action in ignoring the Union with respect to bargaining and in making unilateral changes in employment conditions on May 1, 1974, and thereafter, was tantamount to a withdrawal of its recognition that the Union was the exclusive bargaining representative of the employees in the appropriate unit, and constituted a bypassing of the exclusive collective bargaining representatives as to such unilateral changes. Such conduct is violative of Section 8(a)(5) and (1) of the Act. It is so concluded and found.[17]

[17] The Respondent found to have violated Section 8(a)(5) and (1) of the Act is A. Lasaponara & Sons, Inc., a wholly owned subsidiary of ERE Industries, Inc. ERE Industries, Inc. was not alleged to have violated the Act in such regards.

[18] Although the General Counsel in the complaint in Case 3-CA-5708 alleges in effect that both A. Lasaponara & Sons, Inc., a wholly owned subsidiary of ERE Industries, Inc. *and* ERE Industries, Inc. are Respondents liable for certain specific 8(a)(1) conduct, the facts and allegations involved in Section III C reveal that the conduct involved was conduct of A. Lasaponara & Sons, Inc. and not that of ERE Industries, Inc. Allegations to the effect that ERE Industries, Inc. is responsible for such 8(a)(1) conduct will be recommended to be dismissed. The Respondent responsible for the specific 8(a)(1) conduct found herein is A. Lasaponara & Sons, Inc., a wholly owned subsidiary of ERE Industries, Inc.

[19] See *The Rupp Forge Company*, 201 NLRB 393, 394.

C. *Interference, Restraint and Coercion* [18]

1. Threat of Reprisal

The General Counsel alleges and contends that the Respondent, by John Kosh, on or about November, 1973, suggested to an employee that it would be futile to give any assistance or support to the Union.

The facts reveal and the parties do not dispute that Kosh was a supervisor of the Respondent at the time involved. The Respondent contends in effect that Kosh was not clothed with authority to engage in bargaining negotiations or to make statements on its behalf in such regard. As a supervisor, it is clear, however, that Kosh is an agent within the meaning of the Act for the type of conduct engaged in by him in this case.[19]

Bartle credibly testified to the effect that Kosh, in November, 1973, stated that it would not be permitted for a union to come in if a union were trying to come in. By such statement, the employee was told in effect that if a union were trying to organize the employees, it would be futile for the employees to select the Union since the employer would not accept the Union as an agent for the

employees. By such conduct the Respondent engaged in conduct violative of Section 8(a)(1) of the Act. It is so concluded and found.

2. Joseph Lasaponara: Interrogation, Threats of Reprisals,[20] Promise of Benefits

In the middle of December and at the end of December, 1973, Joseph Lasaponara held meetings in his office with employees, two at a time, in which he admittedly spoke to such employees about the fact that A. Lasaponara & Sons, Inc., was a family run company and inquired as to why they wanted a union and thought they needed a union.

The foregoing is not disputed. What is disputed is whether Joseph Lasaponara, at some of the meetings, made threats of reprisals or promises of benefits concerning the Union.

Eva Wilson credibly testified to the effect that Joseph Lasaponara, at one of the mid-December meetings, told her and Peck that he could not give them raises as long as they were negotiating with the Union. Bonville credibly testified to the effect that Joseph Lasaponara, at one of the mid-December meetings, told him and Radley in effect that if they helped the Union or wanted the Union, he would fix them. Kraeger credibly testified to the effect that Joseph Lasaponara, at one of the meetings at the end of December, told him and Culver in effect that if they helped the Union or wanted the Union, he would fix them.[21] Bartle credibly testified to the effect that Joseph Lasaponara told him and Wyckoff that if they would vote no on the Union, he could go ahead and give them the benefits that they were entitled to.

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[20] The facts are based upon a composite of the credited aspects of the testimony of Eva Wilson, Smith, Peck, Bartle, Bonville, and Joseph Lasaponara.

[21] Bonville's and Kraeger's testimony was in more pungent and descriptive detail. The meaning is as set forth.

Joseph Lasaponara testified in conclusionary effect that he made no threats of reprisals or promises of benefits to the employees. Considering the factual detail presented by the testimony of Wilson, Kraeger, Bonville, and Bartle, I am persuaded that their testimony is more complete, objective and reliable than that of Lasaponara and credit such testimony over Lasaponara's where in conflict.

Considering the foregoing, I am persuaded and conclude and find that the Respondent, as alleged, interrogated its employees in mid-December, 1973, about their union desires, in a manner constituting interference, restraint, and coercion within the meaning of Section 8(a)(1) of the Act.[22] Such conduct is conduct violative of Section 8(a)(1) of the Act. It is so concluded and found.

Considering the foregoing, I am persuaded and conclude that the Respondent, by Lasaponara's statements to Wilson and Peck concerning inability to give raises because of pending union negotiations, and to Bonville and Radley and to Kraeger and Culver to the effect that if they helped or wanted the Union, he would fix them, engaged in threats of reprisals to employees to cause such employees to desist from union activity. Such conduct is violative of Section 8(a)(1) of the Act. It is so concluded and found.

Considering the foregoing, I am also persuaded that the evidence relating to the remarks by Joseph Lasaponara to Bartle and Wyckoff—to the effect that if they would vote no on the Union, he could go ahead and give them the benefits that they were entitled to—constituted a threat of reprisal to employees because of or if they

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[22] The Respondent's contention that the interrogation and conversations were not coercive is rejected. As indicated, the facts reveal threats of reprisals. Further, the total text of the conversations do not reveal any assurances of non-reprisals, and reveal dissatisfaction with the employee union interests.

selected a union. Such statement, at first blush, may appear to have two meanings. One meaning may be said to be a threat that a benefit is not forthcoming because of union consideration. The other meaning may be said to be a promise of a benefit if the union considerations adverse thereto were removed. Since the statement by Lasaponara referred to benefits to which the employees were entitled, I am persuaded that the statement should be construed as a threat of reprisal. I note further that Bartle's testimony places the timing of such statement as being in mid-December, 1973, and that there is no allegation of improper "promise of benefit" relating to the events of mid-December, 1973. At the trial of this matter, the General Counsel contended that Bartle's testimony in such regard related to an alleged "promise of benefit" which allegedly occurred in January, 1974. I am persuaded that this contention is in error and that no evidence was presented with respect to the alleged violative conduct of a "promise of benefit" by Joseph Lasaponara, occurring in January, 1974. The facts, excluding the testimony of Bartle, already clearly establish that the Respondent, by Joseph Lasaponara, made unlawful threats of reprisals in violation of Section 8(a)(1) of the Act. Since the Respondent, by pre-trial motions, has acted diligently to have the issues presented squarely, since the General Counsel's complaint included allegations of improper promises of benefits by Joseph Lasaponara in January, 1974, and since the General Counsel, at the trial, contended such evidence, by Bartle, in support of the allegation of "unlawful promise of benefits," I do not think that due process would be served by a finding that Bartle's testimony as to Joseph Lasaponara's statement, a threat of reprisal, constituted a separate incident of alleged mid-December, 1973, misconduct in such regard. Further, since the evidence does not support an allegation of improper promises of bene-

fits, by Joseph Lasaponara, in January, 1974, recommendation will be made that such allegation be dismissed.

3. Anthony Fazzino

Interrogation

A composite of the credited aspects of the testimony of Marcelletta and Smith reveals that Production Manager Fazzino questioned them during the week of January 8, 1974, about the signing of union cards. What occurred is revealed in effect by the following excerpts from the testimony of Smith.

• • • • • • • • • •

A. Karen and I went in there to ask why he was in such a bad mood and he told us since we wanted to treat him bad that he was going to treat us the same way, that he was going to act like a boss should act.

Q. Is that all that was said during that conversation?

A. No, then he asked Karen and I who signed Union Cards and we told him we didn't know. He said its okay, he knew who signed them and asked if Karen, me and Pete Muraca started the union and we said no, and he said he knew who started it.

• • • • • • • • • •

Bartle credibly testified to the effect that Production Manager Fazzino questioned him, around March 1, 1974, about the occurrence of a union meeting. What occurred is revealed in effect by the following credited excerpt from Bartle's testimony:

• • • • • • • • • •

A. I believe I did but Tony Fazzino asked me—it was about girls being layed off and—

Q. The lay offs that occurred in late February, lay offs of Marge Peck and Eva Wilson?

A. Yes, I remember it now and ask me if the union meetings had taken place and I told him that if there has been a union meeting that I would have been notified. I told him there was no union meeting.

• • • • • • • • • •

Considering the foregoing, it is clear and I conclude and find that the Respondent, by Fazzino, as alleged, engaged in coercive interrogation of employees about union activities of employees. Such conduct is violative of Section 8(a)(1) of the Act. It is so concluded and found.

4. Threats

The General Counsel alleges and contends that the Respondent violated Section 8(a)(1) of the Act (interfered with, restrained, and coerced employees in the exercise of protected concerted activities) by the conduct of Production Manager Fazzino, on April 5, 1974, in crumpling a petition protesting the scheduling of work and in informing an employee that she was a troublemaker after she presented the petition to him.

The facts are undisputed excepting as to whether Fazzino called Eva Wilson a troublemaker. Wilson was a more impressive witness than Fazzino. I found her to appear more objective, frank and forthright in her testimonial demeanor than I did Fazzino. I credit her testimony over Fazzino's where such testimony is in conflict.

The facts[23] reveal that Wilson gave Fazzino, on April 5, 1974, a petition relating to the scheduling of work for Palm Sunday.[24]

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[23] The facts are based upon a composite of the credited testimony of Wilson, Peck and Fazzino. As indicated, I credit Wilson's and Peck's testimony to the effect that Fazzino called Wilson a troublemaker. I discredit Fazzino's testimony to the effect that he did not call Wilson a troublemaker.

[24] I found Peck's overall testimony to the effect that the incident occurred on April 5, 1974, to be the most believable and reliable as to the timing of the presentation of petition.

Such petition was as is herein set out.

WE, THE UNDERSIGNED MEMBERS OF MECHANICS EDUCATIONAL SOCIETY OF AMERICA, AFL-CIO (M.E.S.A., AFL-CIO), EMPLOYEES OF LASAPONARA & SONS, INC. HAVE BEEN ADVISED THAT PALM SUNDAY APRIL 7, 1974 HAS BEEN SCHEDULED AS A DAY OF WORK.

Since this is a religious holiday that is important to us, we request that this schedule be rescinded.

In the event that this schedule is not changed, you are advised that we will not report for work on Palm Sunday, Apr. 7, 1974, but will report to work on Monday, April 8, 1974.

/s/ Eva Wilson
/s/ Gary Bartle
/s/ Marge Peck
/s/ Dick Hayes
/s/ Douglas
/s/ John Tartaglia
/s/ Norman C. Bolton
/s/ Patricia J. Wilson
/s/ Douglas A. Hitts
/s/ Lindsey K. Wyckoff
/s/ Robert J. Kraeger
/s/ Bill Bonville

Dated, ...

What occurred at the time of the presentation of the petition is revealed in effect by the following excerpts from Wilson's testimony:

• • • • • • • • • •

A. Yes, I give him the Petition and told him those are the list of names that the union wrote a Petition, we didn't want to work Palm Sunday. He got kind of mad and crumbled it up and threw it on the floor and wanted to hear it from everybody's mouth.

He got us together and asked us if we would work and we said no, except Pat Wilson and he said he was going to turn our names into Boston whoever didn't work.

Q. Any remarks during this conversation directed to you?

A. Yes, he said I was a troublemaker.

• • • • • • • • • •

Considering all of the foregoing facts, I am persuaded and conclude and find that the Respondent, by Fazzino's conduct in crumpling the petition (concerning the scheduling of hours for Palm Sunday) and in calling Eva Wilson a troublemaker, engaged in conduct violative of Section 8(a)(1) of the Act. Such conduct, in the context of a previous understanding of the handling of grievances and a contemporaneous avoidance of such understanding, reveals a rejection of the principles of collective bargaining and a singling out of the Union's spokesman for an implied threat of reprisal. Accordingly, as indicated, it is concluded and found that such conduct is violative of Section 8(a)(1) of the Act.

D. *Discriminatory Refusal to Hire Muraca—May 27, 1974*

Peter Muraca was working for A. Lasaponara in November, 1973. In November, 1973, Muraca signed a card authorizing the Union (Mechanics Educational Society of America, AFL-CIO) to be his collective bargaining representative. Later the Union put Muraca on its shop organizational committee and so notified A. Lasaponara & Sons, Inc., by letter, dated December 7, 1973. As a part of such shop committee, Muraca met with the union representatives, other members of the committee, and Fazzino on December 20, 1973, when the Union gave Fazzino a document relating to recognition of the Union.

The last day that Muraca worked for A. Lasaponara & Sons, Inc., was on December 21, 1973. Muraca was given a 2 weeks suspension as of December 26, 1973, and received his final pay and was terminated around January 21, 1974. Although the exact details as to what occurred may be in some dispute, there is no contention that the suspension for 2 weeks, or the termination around January 21, 1974, were for discriminatory reasons within the meaning of the Act.

Later there appears to have arisen some problems concerning the receipt of unemployment pay by Muraca. It is clear, however, that there is no evidence to relate such problem to the refusal of the Respondent to rehire Muraca on May 27, 1974.

As the instant record reveals, the Union filed unfair labor practice charges in Case 3-CA-5634 concerning the instant allegations of refusal to bargain. The record further clearly reveals that the investigation of such charges were pending and being processed in May, 1974.

The only evidence relating to Muraca's attempt to secure employment from the Respondents on May 27, 1974, consists of the testimony of Muraca. I credit such testimony, and the facts as to what occurred on May 27, 1974, are revealed by the following credited excerpts from Muraca's testimony:[25]

• • • • • • • • • •

A. Well, on the 27th I had been on unemployment for a while and I wanted to get back to work. I was telling Lindsey Wyckoff if I could get back to work, he said the best thing would be is to go back to the plant and talk to him. On May 27th I went in

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[25] Fazzino did not testify to these events of May 27 and June 10, 1974, nor did he testify as to why he would not rehire Muraca at such time. Rather, Fazzino's testimony was directed to the validity of the January 21, 1974 discharge.

the office and talked to Tony and asked Tony if I could have my job back and he said, Pete, I know we need people, I have to wait until this union thing gets settled, I said what does this have to do with me and he said you got me in trouble and some guy from the Board had a meeting with him and some guy Oddi and I don't see what this has to do with me and if I am a good worker and need help, I don't know why I can't get work. He said he would call me so I left.

Q. Did he call you?

A. No.

Q. Did you ever return to the plant after that?

A. On June 10th, I went back there and went in the office and talked to Tony and asked Tony could I have my job back. He said I will have to talk to Oddi and at this time I noticed he was hiring all these new people and I noticed them and I asked Tony what is this, you hired all these other people and you don't give me a call to give me a job, he said we need help and he would have to talk to Oddi and would call me. I left again and never got a call.

• • • • • • • • • •

Considering all of the foregoing, I am persuaded and conclude and find that the Respondents refused to hire Muraca on May 27, 1974, and thereafter, because of knowledge of his adherence to the Union and the pending unfair labor practice charges and union claims as an exclusive collective bargaining representative. Thus, it is clear that the Respondents knew Muraca was a union supporter and was basing its consideration upon union considerations and the pendency of NLRB charges. Under such circumstances, the selection for employment is one based upon discriminatory considerations. Accordingly, it is concluded and found that the Respondent violated Section 8(a)(3)

and (1) of the Act by discriminatorily refusing to hire Muraca on May 27, 1974, and thereafter.[26]

E. *The June 7, 1974 Discharges*

As indicated previously, Eva Wilson, the chairlady of the Union shop committee, on April 5, 1974, presented a petition requesting the rescinding of the scheduling of hours of work on a religious holiday, Palm Sunday, to Production Manager Fazzino. Also, as indicated previously, Fazzino crumpled the petition, called Wilson a troublemker, and then ascertained which employees would say that they would work on Palm Sunday. Later, on April 6, 1974, DeBella, for the Union, and Fazzino discussed the petition, the fact that Fazzino had called Wilson a troublemaker concerning the petition, Wilson's right to present the petition, a suggestion by DeBella that the employees would be willing to work overtime during the week to make up for the Sunday hours, and Fazzino's problems and need for production and time for distribution. Fazzino told DeBella in effect that if the employees did not want to work, he could not force them to work.

Around April 5, 1974, Fazzino spoke to Oddi, president of ERE Industries, Inc. What occurred is revealed by the following credited excerpts from Oddi's testimony:

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[26] The General Counsel's complaint alleged in effect that both A. Lasaponara & Sons, Inc., a wholly owned subsidiary of ERE Industries, Inc. and ERE Industries, Inc. were the Respondents responsible for the discriminatory refusal to hire Muraca on May 27, 1974. Since ERE Industries, Inc. had acquired ownership control of A. Lasaponara & Sons, Inc., since Oddi, president of ERE became president also of A. Lasaponara, and since the local management looked to ERE for top management and handling of labor relations, I find that the Respondent's operations were intertwined and in effect a single employer for the purposes of Section 8(a)(3) of the Act.

A. This would have been my recollection, is that he either called me on the Thursday or Friday that it happened and in short there was this threat of absenteeism during this period and I said first keep in mind that I am not the owner of this company nor do I have any authority in it and therefore, no responsibility so whatever you do, is really your own decision. However, my suggestion is that because some people apparently have responded, they will come in, why don't you wait and see how many do come in and make the best of it as you possibly can. At that point, he really had little alternative.

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On Palm Sunday, April 7, 1974, employees Eva Wilson, William Bonville, Robert Kraeger, Margaret Peck, Richard Hayes, Gary Bartle, and Douglas Hitts did not work. Said employees however returned to work on April 8, 1974. Later, Hitts was terminated for reasons unimportant to the issues in this case. The other named employees continued to work until June 7, 1974.

A. Lasaponara & Sons, Inc., took no action and made no statements to the above-named employees from April 7, 1974, until the date that ERE Industries, Inc., obtained ownership interest on April 23, 1974. Thereafter, A. Lasaponara & Sons, Inc., a wholly owned subsidiary of ERE Industries, Inc., took no action and made no statements to the above-named employees until June 7, 1974. At this time, Oddi, president of ERE Industries, Inc., and president of A. Lasaponara, instructed Fazzino to terminate such employees because they had refused to work on Palm Sunday. Thereupon, Fazzino terminated the employment of Eva Wilson, William Bonville, Robert Kraeger, Margaret Peck, Richard Hayes, and Gary Bartle. Fazzino told such employees that they were being terminated because they had refused to work on April 7, 1974, Palm Sunday.

In addition to the foregoing, the following facts are noted.[27] (1) Prior to 1974, A. Lasaponara & Sons, Inc., customarily worked on Palm Sunday with respect to production needs for the oncoming Easter week. (2) The employees gave notice only as of April 5, 1974, of their intended refusal to work on April 7, 1974. (3) The employees evidenced no intent to engage in repeated or intermittent refusals to work. (4) The Respondent did not question the employees as to their future intentions regading such work or similar work. (5) The facts reveal that Eva Wilson, William Bonville, Robert Kraeger, Margaret Peck and Gary Bartle all had signed union cards by December 1, 1973, that Wilson, Kraeger, Bonville, Muraca and Peck were on the union organizational or shop committee, as notified to the Respondent on December 7, 1973, and that Wilson, Kraeger and Bonville were with the union representatives on December 20, 1973, in the meeting with Fazzino.

Further, on Monday, April 8, 1974, Production Manager Fazzino telephoned Oddi, president of ERE Industries, Inc., and told him about the employees who had not worked on Palm Sunday. Oddi told Fazzino that he (Oddi) had no authority to tell him what to do at the time (since ownership by ERA of A. Lasaponara had not been acquired at this time), suggested that he do nothing but let him (Oddi) investigate and get expert advice, and that he would later let Fazzino know what should be done.[28]

Oddi contacted his attorney about the legal ramifications of the employees' refusal to work on Palm Sunday. Oddi's attorney suggested that he contact other counsel. Oddi contacted other counsel about this matter and ultimately

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[27] The facts are based upon a composite of the credited aspects of all the witnesses' testimony.

[28] The facts are based upon a composite of the credited aspects of the testimony of Fazzino and Oddi.

instructed Fazzino to discharge the employees who had refused to work on Palm Sunday as is revealed by the following credited excerpts from Fazzino's testimony.

• • • • • • • • • •

A. He told me that the people never came to work on Palm Sunday to be dismissed and I asked Mr. Oddi what reason, because I forget about—about Palm Sunday and he said, tell the people they were dismissed for not reporting to work when we needed them.

• • • • • • • • • •

Contentions

CONCLUSIONS

The General Counsel alleges and contends that the Respondents discharged Wilson, Bonville, Kraeger, Peck, Hayes and Bartle on June 7, 1974, because of their union activities and because they engaged in protected concerted activities. I am persuaded from the statements of Counsel, the cases cited, and the facts as a whole, that the real issue presented is whether the employees were discharged because of their protected concerted activities. I would note, however, that the overall facts make it suspicious that the union activities of the employees might be a part of the motivation for the June 7, 1974, discharges. Thus, most of the discharged employees had engaged in union activity which was known to the Respondents, and the unfair labor practice charges relating to the refusal to bargain issues were pending. Respondents have, one or the other or both, engaged in conduct violative of Section 8(a)(1) of the Act, have refused to bargain with the Union in violation of Section 8(a)(5) of the Act, and have discriminated in the employment of Muraca on May 27, 1974, based upon union considerations. Accordingly, it is suspicious that the discharge of the employees on June 7, 1974, was based upon considerations of the union activities

of the employees, a desire to destroy the Union, and a utilization of a belief of an unprotected concerted activity as a pretext. However, I am persuaded that the overriding nature of the "protected concerted" activity issue makes a finding that the discharges were for discriminatory reasons somewhat speculative. Accordingly, it will be recommended that the allegation of conduct violative of Section 8(a)(3) be dismissed.

Considering all of the facts, I am persuaded and conclude and find that the employees' refusal to work on April 7, 1974, Palm Sunday, was a protected concerted activity. Such refusal to work constituted a strike of limited duration and was unaccompanied by evidence of an intent to engage in repeated or intermittent strikes. Board case law reveals that when an employee engages in a strike of limited duration, a one time strike is presumed to be protected unless there is evidence of an intent to engage in repeated or intermittent strikes. In such a limited and one time strike, the employee is not attempting to enjoy the benefits of a strike without the detriments of a strike.[29] Such is the case here. The facts are undisputed that the Respondent discharged Wilson, Bonville, Kraeger, Peck, Hayes and Bartle on June 7, 1974, because they refused to work on Palm Sunday, April 7, 1974. Accordingly, it is concluded and found that the discharge of employees for their protected concerted refusal to work on April 7, 1974, constituted conduct violative of Section 8(a)(1) of the Act.[30]

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[29] *Polytech Incorporated*, 195 NLRB 695.

[30] It is not necessary to determine whether Respondent's conduct in waiting from April 7, 1974 to June 7, 1974, to discharge the employees constituted "condonation" of such refusal to work. If necessary, however, I would make such a finding. Thus, between April 8, 1973, and, April 23, 1974, the authority to discharge the employees was in the hands of the officials of A. Lasaponara & Sons, Inc. at that time. Such officials took no action and, in fact, Fazzino, part owner and Production Manager, obviously forgot the events of April 7, 1974. Such conduct revealed condonation in

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondents set forth in section III, above, occurring in connection with the Respondents' operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondents have engaged in unfair labor practices, it will be recommended that the Respondents cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that the Respondents refused to hire Peter Muraca on May 27, 1974, in violation of Section 8(a)(3) and (1) of the Act, the recommended Order will provide that Respondents offer him employment in the position for which he was discriminatorily considered, or to a substantially equivalent position if such position no longer exists, and make him whole for loss of earnings within the meaning and in accord with the Board's decisions in *F. W. Woolworth Company*, 90 NLRB 289; *Isis Plumbing & Heating Co.*, 138 NLRB 716, except as specifically modified by the wording of such recommended Order.

It having been found that the Respondents discharged Eva Wilson, William Bonville, Robert Kraeger, Margaret Peck, Richard Hayes and Gary Bartle on June 7, 1974, in violation of Section 8(a)(1) of the Act, the recommended Order will provide that Respondents offer each reinstatement to his or her former position or if such position is not available, to a substantially equivalent position, and

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fact. As indicated elsewhere, I find that the Respondents' business was intertwined, a single employer in effect, and that both are responsible for the June 7, 1974, discharges of employees.

make each whole for loss of earnings within the meaning and in accord with the Board's decisions in *F. W. Woolworth Company*, 90 NLRB 289; *Isis Plumbing & Heating Co.*, 138 NLRB 716, except as specifically modified by the wording of such recommended Order.

Having found that the Respondent, A. Lasaponara & Sons, Inc., a wholly owned subsidiary of ERE Industries, Inc., unlawfully, unilaterally made changes in its benefits including at least in part holidays, sick days, bereavement, health and life insurances, it will be required, if requested by the Union, to rescind such changes, provided however that, absent such request, there is no requirement for a rescinding of such changes in benefits.

Having found that the Respondent, A. Lasaponara & Sons, Inc., a wholly owned subsidiary of ERE Industries, Inc., has refused to bargain collectively with the Union, it will be recommended that the Respondent, A. Lasaponara & Sons, Inc., a wholly owned subsidiary of ERE Industries, Inc., upon request, bargain with the Union as the exclusive representative of its employee in the appropriate unit.

Since A. Lasaponara & Sons, Inc. is a wholly owned subsidiary of ERE Industries, Inc. and the employees involved are directly employed by such subsidiary corporation, I am persuaded that the normal posting of a remedial notice by said subsidiary adequately disposes of such remedial requirement in such regard, and thereby shall recommend the posting of such remedial notice only by A. Lasaponara & Sons, Inc., a wholly owned subsidiary of ERE Industries, Inc.

Because of the character and scope of the labor practices herein found, the recommended Order will provide that the Respondents cease and desist from in any other manner interfering with, restraining, and coercing em-

ployees in the exercise of their rights guaranteed by Section 7 of the Act.

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. A. Lasaponara & Sons, Inc., at all times relevant prior to April 23, 1974, and A. Lasaponara & Sons, Inc., a wholly owned subsidiary of ERE Industries, Inc., subsequent to April 23, 1974, and ERE Industries, Inc. each, at all times relevant herein, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Mechanics Educational Society of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to hire Peter Muraca on May 27, 1974, the Respondents have discouraged union membership by discriminating in regard to tenure of employment, thereby engaging in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

4. By discharging Eva Wilson, William Bonville, Robert Kraeger, Margaret Peck, Richard Hayes, and Gary Bartle on June 7, 1974, the Respondents have interfered with, restrained and coerced employees in the exercise of Section 7 rights and have thereby violated Section 8(a)(1) of the Act.

5. All production and maintenance employees, employed by A. Lasaponara & Sons, Inc., (a wholly owned subsidiary of ERE Industries, Inc., since April 23, 1974) at its Base Road, Oriskany, New York, location; excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

6. At all times on and after December 1, 1973, the Union has been the exclusive representative of all the employees in said unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

7. By making unilateral changes in conditions of employment of the employees in the above unit around May 1974, the Respondent, A. Lasaponara & Sons, Inc., a wholly owned subsidiary of ERE Industries, Inc., has refused to bargain with the Union and has thereby engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

8. By interfering with, restraining and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, Respondent, A. Lasaponara & Sons, Inc., (a wholly owned subsidiary of ERE Industries, Inc., since April 23, 1974) has engaged in unfair labor practices proscribed by Section 8(a)(1) of the Act.

9. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER [31]

A. Respondent, A. Lasaponara & Sons, Inc., a wholly owned subsidiary of ERE Industries, Inc., its officers, agents, successors and assigns, shall:

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[31] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Coercively interrogating employees concerning their union membership, activities or desires.

(b) Threatening employees with reprisals to dissuade them from supporting the Union.

(c) Refusing to bargain collectively with the Union as the exclusive collective bargaining representative of the employees in the bargaining unit herein found to be appropriate.

(d) Refusing to hire, discharging or otherwise discriminating against employees in regard to hire or tenure of employment or any term or condition of employment, in order to encourage or discourage membership in any labor organization or to interfere with, restrain or coerce employees in the exercise of Section 7 rights, except to the extent that such rights may be affected by lawful agreements in accord with Section 8(a)(3) of the Act.

(e) In any other manner interfering with, restraining or coercing the employees of A. Lasaponara & Sons, Inc., a wholly owned subsidiary of ERE Industries, Inc., in the exercise of their rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by lawful agreements in accord with Section 8(a)(3) of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Upon request, bargain with Mechanics Educational Society of America, AFL-CIO, as the exclusive collective bargaining representative of its employees in the unit herein found appropriate and embody any understanding reached in a signed agreement. The appropriate bargaining unit is "all production and maintenance employees, employed by A. Lasaponara & Sons, Inc., a wholly

owned subsidiary of ERE Industries, Inc., at its Base Road, Orskany, New York, location; excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act."

(b) If requested by the Union, rescind the unilateral changes made around May, 1974, and thereafter, in benefits of employment of the employees in the appropriate bargaining unit found herein—provided, however, absent such request by the Union, that there is no requirement for a rescinding of such changes in benefits.

(c) Offer to Peter Muraca immediate employment to the position for which he was discriminatorily considered on May 27, 1974, or if such position no longer exists, to a substantially equivalent position, and make him whole for loss of pay suffered by reason of the discrimination against him in the manner described above in the section entitled "The Remedy."

(d) Offer Eva Wilson, William Bonville, Robert Kraeger, Margaret Peck, Richard Hayes, and Gary Bartle immediate and full reinstatement to his or her former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to seniority or other rights previously enjoyed, and make each whole for any loss of pay suffered by reason of their unlawful discharge in the manner described above in the section entitled "The Remedy."

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay under the terms of this recommended Order.

(f) Post at its place of business at Base Road, Oriskany, New York, copies of the attached notice marked

"Appendix."[32] Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by said Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by said Respondent for 60 consecutive days thereafter, in conspicious places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by said Respondent to insure that said notices are not altered, defaced or covered by any other material.

(g) Notify the Regional Director for Region 3, in writing, within 20 days from the date of the receipt of this Order, what steps the Respondent has taken to comply herewith.

B. Respondent, ERE Industries, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Through and with its subsidiary, A. Lasaponara & Sons, Inc., refusing to hire, discharging or otherwise discriminating against employees in regard to hire or tenure of employment or any term or condition of employment, in order to encourage or discourage membership in any labor organization or to interfere with, restrain or coerce employees in the exercise of Section 7 rights, except to the extent that such rights may be affected by lawful agreements in accord with Section 8(a)(3) of the Act.

(b) Through and with its subsidiary, A. Lasaponara & Sons, Inc., in any other manner interfering with, restraining, or coercing the employees of A. Lasaponara

[32] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

& Sons, Inc., a wholly owned subsidiary of ERE Industries, Inc., in the exercise of their rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by lawful agreements in accord with Section 8(a)(3) of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Through and with its subsidiary, A. Lasaponara & Sons, Inc., offer to Peter Muraca immediate employment to the position for which he was discriminatorily considered on May 27, 1974, or if such position no longer exists, to a substantially equivalent position, and make him whole for any loss of pay suffered by reason of the discrimination against him in the manner described above in the section entitled "The Remedy."

(b) Through and with its subsidiary, A. Lasaponara & Sons, Inc., offer Eva Wilson, William Bonville, Robert Kraeger, Maragaret Peck, Richard Hayes, and Gary Bartle immediate and full reinstatement to his or her former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to seniority or other rights previously enjoyed, and make each whole for any loss of pay suffered by reason of their unlawful discharge in the manner described above in the section entitled "The Remedy."

(c) Notify the Regional Director for Region 3, in writing, within 20 days from the date of the receipt of this Order, what steps the Respondent has taken to comply herewith.

It is recommended that the allegation of the complaint of violative conduct, not found herein, be dismissed.

Dated at Washington, D.C.

/s/ JERRY B. STONE
Jerry B. Stone
Administrative Law Judge

Form NLRB-4727 (9-69) JD-724-74

(SEAL) (SEAL)

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT threaten our employees with reprisals to dissuade them from supporting the Union.

WE WILL NOT refuse to bargain collectively with the Union as the exclusive collective bargaining representative of the employees in the bargaining unit herein found to be approved.

WE WILL NOT refuse to hire, will not discharge, or otherwise discriminate against employees in regard to hire or tenure of employment, in order to encourage or discourage membership in a labor organization or to interfere with, restrain, or coerce employees in the exercise of Section 7 rights, except to the extent that such rights may be affected by lawful agreements in accord with Section 8(a)(3) of the Act.

WE WILL NOT in any other manner interfere with, restrain or coerce the employees of A. LASAPONARA & SONS, INC., a wholly owned subsidiary of ERE INDUSTRIES, INC., in the exercise of their rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by lawful agreements in accord with Section 8(a)(3) of the Act.

WE WILL, upon request, bargain with MECHANICS EDUCATIONAL SOCIETY OF AMERICA, AFL-CIO, as the exclusive collective bargaining representative of our employees in

the unit herein found appropriate and embody any understanding reached in a signed agreement.

The appropriate bargaining unit is "All production and maintenance employees, employed by A. LASAPONARA & SONS, INC., a wholly owned subsidiary of ERE INDUSTRIES, INC., at its Base Road, Oriskany, New York, location; excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act."

WE WILL if requested by the Union, rescind the unilateral changes, made around May, 1974 and thereafter, in benefits of employment of the employees in the appropriate bargaining unit, set forth above, provided, however, absent such request by the Union, there is no requirement for a rescinding of such changes in benefits.

WE WILL offer to Peter Muraca immediate employment to the position for which he was discriminatorily considered on May 27, 1974, or if such position no longer exists, to a substantially equivalent position, and *make him whole* for any loss of pay suffered by reason of the discrimination against him.

WE WILL offer to Eva Wilson, William Bonville, Robert Kraeger, Margaret Peck, Richard Hayes, and Gary Bartle immediate and full reinstatement to his or her former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights previously enjoyed, and make each whole for any loss of pay suffered by reason of their unlawful discharge.

All of our employees are free to become or remain, or refrain from becoming or remaining, members of any labor organization except to the extent that such rights

may be affected by lawful agreements in accord with Section 8(a)(3) of the Act.

A. LASAPONARA & SONS, INC.,
A WHOLLY OWNED SUBSIDIARY OF
ERE INDUSTRIES, INC.
(Employer)

Dated .....

By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 9th Floor, Federal Building, 111 - W. Huron Street, Buffalo, New York 10007, (Tel. No. 716-842-3100).

Supreme Court, U. S.
FILED
MAR 2 1977
MICHAEL RODAK, JR., CLERK

No. 76-863

In the Supreme Court of the United States

OCTOBER TERM, 1976

A. LASAPONARA & SONS, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 541 F. 2d 992. The decision and order of the National Labor Relations Board (Pet. App. 15a-21a) and the decision of the Administrative Law Judge (Pet. App. 22a-64a) are reported at 218 N.L.R.B. 1096.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1976. The petition for a writ of certiorari was filed on December 22, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's findings that petitioners discharged certain employees for having engaged in concerted activity protected by the National Labor Relations Act.

2. (a) Whether petitioners failed to preserve their right to obtain judicial review of that portion of the Board's order requiring petitioners to recognize and bargain with the Union.

(b) Whether, in any event, the Board's order was proper in the circumstances of this case.

STATUTES INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are set forth at Pet. 2-4.

STATEMENT

1. Petitioner A. Lasaponara & Sons, Inc. (the "Company"), manufactures and distributes on a wholesale basis cheese and related products (Pet. App. 1a; A. 4-5, 114).[1] In the autumn of 1973, a majority of the employees in an appropriate unit at the Company's Oriskany, New York, plant signed cards authorizing the Mechanics Educational Society of America, AFL-CIO (the "Union"), to act as their representative for collective bargaining purposes (Pet. App. 1a; A. 6, 52). On December 3, 1973, the Union wrote to the president of the Company and requested a meeting to begin negotiations on a collective agreement. On December 5, the Union filed with the Board a petition for a representation election (Pet. App. 2a; A. 6-7, 53, 58-59, 154, 156).

[1] "A." refers to the parties' printed appendix in the court of appeals. We are lodging a copy of this appendix with this Court.

On December 12, 1973, officials of the Union met with Company representatives, including Company president and co-owner Joseph Lasaponara. Lasaponara stated at that meeting that he had no objection to the Union, but was concerned that a Board election at that time could affect production and upset pending merger negotiations. The Union's officials suggested that those problems could be avoided if the Company were prepared voluntarily to recognize the Union as its employees' exclusive bargaining agent on the strength of the authorization cards (Pet. App. 2a-3a; A. 8-9, 60-61, 75). Two days later, Lasaponara again met with the Union officials and agreed to recognize the Union, grant an immediate 20-cent per hour wage increase, and continue existing employee benefits. In return, the Union agreed to withdraw its election petition and to delay contract bargaining until April 1, 1974, the date by which it was expected that the merger negotiations would be completed. The parties also agreed to put the recognition agreement in writing (Pet. App. 3a; A. 9-11, 61-62, 75-77).

All the elements of the December 14 agreement were carried out by the parties, except that Lasaponara failed to sign the written memorandum of recognition that the Union presented to plant manager and co-owner Anthony Fazzino on December 20, 1973, for transmittal to Lasaponara. When Union official James DeBella asked Fazzino in January 1974 about Lasaponara's failure to sign, Fazzino blamed it on the holidays; in February 1974, in response to DeBella's further inquiry, Fazzino stated that Lasaponara had a very busy schedule. Despite the absence of a signed agreement, the Union dealt with Company officials about employee grievances through the winter (Pet. App. 4a; A. 9 n. 9, 12-13, 63-64, 67, 77-80, 89, 126-127, 159-161).

In the meantime, Lasaponara's merger negotiations with ERE Industries, Inc. ("ERE"), continued and an agreement was reached. On March 27, 1974, Frank Oddi, president of

ERE, who was slated to become president of the Company as well,[2] met with the Company's employees and informed them that the employee benefits in effect at ERE would be extended to them as well (Pet. App. 5a; A. 15, 53-54, 90-91, 142-143). Union official DeBella, upon learning of Oddi's involvement, telephoned but was unable to reach him; DeBella left a message for Oddi to return the call. Although Oddi knew the call was from the Union, he did not return it (Pet. App. 5a; A. 15, 82-83, 149-150). On May 1, the benefit changes promised by Oddi on March 27 were put into effect (Pet. App. 5a; A. 16, 141-143).

On Friday, April 5, 1974, Union Shop Committee Chairperson Eva Wilson presented a petition to Fazzino requesting that the schedule calling for work on Palm Sunday, two days hence, be rescinded due to the religious nature of the holiday. The petition went on to state that the signers of the petition would not work on Palm Sunday (Pet. App. 10a-11a; A. 24, 56-57, 65, 91, 96-97, 155). Fazzino did not alter the work schedule,[3] and six employees refused to work on Palm Sunday. All returned to work the following Monday. Two months later, after ERE had acquired its ownership interest,[4] they were discharged on the ground that they had refused to work on Palm Sunday (Pet. App. 11a; A. 25, 28-30, 91-92, 96-97, 103-105, 107).

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[2]Lasaponara had advised Oddi in January 1974 that there had been some union activities at the Company but that they were under control. Moreover, in March 1974, Lasaponara had advised Oddi that the Union was dealing with the Company concerning employee grievances. Oddi told Lasaponara to be careful since he was not authorized to bind ERE without ERE's knowledge (Pet. App. 34a-35a).

[3]Fazzino contacted Oddi, who suggested that he continue operations with those employees who did report for work on Palm Sunday (Pet. App. 49a-50a).

[4]On April 23, 1974, ERE and the Company executed an agreement whereby ERE purchased all of the Company's stock; the former owners, Lasaponara and Fazzino, remained in executive positions (Pet. App. 5a; A. 15, 55, 118, 126).

2. Pursuant to charges filed by the Union, the Board found that the Company orally had recognized the Union in December 1973, at which time it had been designated by a majority of the employees in an appropriate unit as their collective bargaining representative; that the employing entity remained the same notwithstanding the sale of the Company to ERE; and that the Company therefore had violated Section 8(a)(5) and (1) of the Act by ignoring the Union's request for bargaining and by making unilateral changes in terms and conditions of employment (Pet. App. 37a-38a, 57a). The Board further found that the Palm Sunday strike was concerted activity protected by the Act and that the Company and ERE had violated Section 8(a)(1) of the Act by discharging the strikers (Pet. App. 52a-53a, 56a). The Board ordered the Company and ERE, *inter alia*, to bargain with the Union and to reinstate the discharged strikers with back pay (Pet. App. 16a-17a, 57a-61a).[5]

The court of appeals sustained the Board's findings and enforced its order (Pet. App. 1a-14a).[6]

ARGUMENT

1. Contrary to petitioners' contention (Pet. 8-13), the court of appeals' holding that the strike or work stoppage on

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[5]The Board also found that the Company had interrogated employees in a coercive manner and had threatened employees, in violation of Section 8(a)(1) of the Act, and that both the Company and ERE had violated Section 8(a)(3) and (1) by failing to rehire another employee because of his union activity (Pet. App. 40a-44a, 48a-49a, 56a). These findings, sustained by the court of appeals (Pet. App. 8a-10a, 13a-14a), are not challenged in this proceeding.

[6]In finding that the Palm Sunday strikers' activity was protected, the court of appeals found it unnecessary to reach the propriety of the Board's further finding that petitioners' two-month delay in acting against the strikers constituted condonation of the strike (Pet. App. 13a n. 11).

Palm Sunday was concerted activity, protected by Section 7 of the Act, is in accord with settled authority. See, *e.g.*, *National Labor Relations Board* v. *Leprino Cheese Co.*, 424 F. 2d 184 (C.A. 10), certiorari denied, 400 U.S. 915; *National Labor Relations Board* v. *Morris Fishman and Sons, Inc.*, 278 F. 2d 792 (C.A. 3); *National Labor Relations Board* v. *M & M Bakeries, Inc.*, 271 F. 2d 602 (C.A. 1). As the court of appeals stated (Pet. App. 11a-12a; citations omitted):

> The one day strike or work stoppage by the discharged employees in support of their petition protesting the Palm Sunday schedule is statutorily protected because it constituted concerted activity aimed at changing working conditions at the plant. • • • While the strike undoubtedly brought inconvenience and economic loss to the Company in view of its unusually heavy production schedule due to the Easter season, such a result is obviously the very object of any concerted employee action protected by the Act.

The cases relied on by petitioners are not to the contrary. *National Labor Relations Board* v. *Marshall Car Wheel and Foundry Co.*, 218 F. 2d 409 (C.A. 5), *National Labor Relations Board* v. *Reynolds & Manley Lumber Co.*, 212 F. 2d 155 (C.A. 5), and *United States Steel Co.* v. *National Labor Relations Board*, 196 F. 2d 459 (C.A. 7), all involved situations in which the timing of the walkouts created severe danger to the employer's physical plant. Here, by contrast, th only "danger" was loss of production—a result that is inherent in any strike. The fact that the work stoppage occurred during the holiday season, and thus may have increased the sales loss, did not make the activity unprotected. See *National Labor Relations Board* v. *Leprino Cheese Co., supra*, 424 F. 2d at 186-187.

Dobbs Houses, Inc. v. *National Labor Relations Board*, 325 F. 2d 531 (C.A. 5), and *American Art Clay Co.* v. *National Labor Relations Board*, 328 F. 2d 88 (C.A. 7), both involved strikes to protest the employer's choice of supervisors, a subject which is not as clearly within the protection of Section 7 of the Act as is the work scheduling controversy at issue here. Moreover, in *Dobbs Houses*, the strike of restaurant waitresses was called on the spur of the moment, at the height of the dinner period (325 F. 2d at 539). Here, two-days' notice was given by the employees, thus enabling the Company to make alternative arrangements.[7]

2.(a) The Board also found, and the court of appeals agreed, that petitioners had violated Section 8(a)(5) and (1) of the Act by reneging on an agreement to recognize the Union, which represented a majority of the Company's employees in an appropriate unit, and by making unilateral changes in employment conditions. Petitioners now contend (Pet. 13-17) that the court of appeals "overlooked" distinctions between the present case and *National Labor Relations Board* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 279, in imposing a bargaining obligation on the Company's "successor," ERE Industries. But petitioners did not raise that issue in the court of appeals; petitioners there merely challenged the propriety of the Board's factual finding that the Company unequivocally had recognized the Union in December 1973 (see Pet. App.

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[7]The decision below also is consistent with the statement in *Shelly & Anderson Furniture Mfg. Co.* v. *National Labor Relations Board*, 497 F. 2d 1200, 1203 (C.A. 9), that, "in order to be protected the employee must choose either to be on the job and subject to the employer's rules or to be off the job and bear the commensurate economic burden." Here, the employees chose the latter course.

6a-7a).[8] Consequently, there is no occasion for this Court to consider the successorship issue. *E.g., Neely* v. *Eby Construction Co.*, 386 U.S. 317, 330; *Lawn* v. *United States*, 355 U.S. 339, 362-363 n. 16.

(b) In any event, the Board's bargaining order was proper. The Board found that the transaction between the Company and ERE did not change the nature of the employing entity (Pet. App. 38a). Although the Company became a wholly owned subsidiary of ERE and Frank Oddi, president of ERE, also became president of the Company, the Company continued to operate as before, with the same employees and with Joseph Lasaponara and Anthony Fazzino remaining as principal operating officials. In these circumstances, the Board correctly concluded that the bargaining obligation that the Company owed to the Union was not extinguished when the Company became a subsidiary of ERE.[9] Furthermore, since Oddi, who was president of ERE and became president of the Company, was largely responsible for the unilateral changes which

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[8]Indeed, petitioners expressly stated in their brief in the court of appeals (p. 2) that "this case raises no successorship issues" (citing *National Labor Relations Board* v. *Burns International Security Services, Inc., supra*).

[9]Contrary to petitioners' contention (Pet. 15-16), nothing in *National Labor Relations Board* v. *Burns International Security Services, Inc., supra*, indicates that a voluntarily recognized union is entitled to less consideration in a successorship situation than a union certified following a Board election. See *National Labor Relations Board* v. *Foodway of El Paso*, 496 F. 2d 117, 120 (C.A. 5); *National Labor Relations Board* v. *Bachrodt Chevrolet Co.*, 468 F. 2d 963, 968 (C.A. 7), remanded, 411 U.S. 912, reaffirmed May 8, 1975 (unpublished order), 515 F. 2d 512, certiorari denied, No. 75-261, November 3, 1976.

sought to undermine the Union,[10] the Board was justified in making its bargaining order applicable to ERE.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Acting Solicitor General.

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Deputy General Counsel,

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NORTON J. COME,
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Attorney,
National Labor Relations Board.

MARCH 1977.

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[10]While the Board did not specifically find that Oddi was aware of the Company's oral agreement to recognize the Union (see Pet. 5-6), the record shows that Joseph Lasaponara apprised Oddi of the status of union activity at the Company (see discussion at page 4, *supra*).